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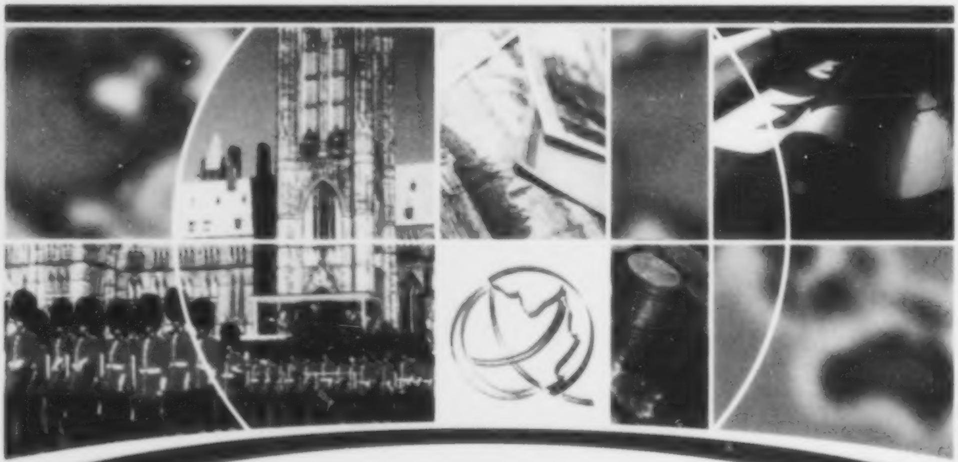

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John M. Curtis and Dan Ciuriak
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Foreword

This volume brings together the results of analysis and research undertaken within, on behalf of, or in collaboration with International Trade Canada over the past year. Launched in 2001 as part of the response to the Government of Canada's *Policy Research Initiative*, a government-wide effort to re-create and expand its research capacity, the *Trade Policy Research* series is now in its fourth edition.

Previous volumes have traced the debate in trade policy circles since the watershed developments at the 1999 WTO Ministerial in Seattle, through the launch and early phases of the Doha Round, touching on topical issues of the times from the post-Seattle surge of interest in regional trade agreements, to the post-9/11 concerns about trade and security, to the ongoing articulation of the interface between international trade and investment agreements and domestic policy.

This year's volume continues in that vein. Part I addresses issues confronting the Doha Development Agenda as it overcame a collapse at the Fifth WTO Ministerial Conference at Cancún to reach agreement on the framework for negotiations in July, 2004 that might now set the stage for an ambitious and successful outcome.

Part II reviews development-related issues bearing on the global trading system, not least the key issue of technical assistance and capacity building that may well hold the key to reaching agreement on a package in the Doha Development Agenda.

Part III focuses more closely on Canada-specific issues. The four chapters describe: Canada's approach to development of trade and investment policy, including the role of consultations and analytical support; the new International Trade Canada computable general equilibrium model for analyzing the impact of trade policies on Canada; an assessment of the importance of Canada-US trade for employment in the United States; and a major review of the implications of Canada's commitments under the General Agreement on Trade in Services for policy development and delivery in the sphere of health, education and social services.

Through this volume, International Trade Canada seeks to continue to contribute actively to the development of new approaches to policy and thinking concerning the role of international trade and investment in Canada and in the global economy more generally. And, in the process, we continue to work in the spirit of the broader commitment of the Government of Canada to stimulate the development of its research capacity. Accordingly, the papers presented in the various chapters are written in the personal capacity of the authors and do not represent the views of their Departments or Agencies or of the Government of Canada. At the same time, we continue to foster links with professional and academic commentators by continuing the pattern set in previous *Trade Policy Research* editions of including contributions from that sector.

This volume was produced under the guidance of John M. Curtis, Senior Policy Advisor and Co-ordinator, Trade and Economic Analysis, International Trade Canada, together with co-editor and managing editor Dan Ciuriak, Senior Economic Advisor, Trade and Economic Policy and Trade Litigation.

Robert Fonberg
Deputy Minister for International Trade

Ottawa
February, 2005

Part I

The Evolving Context for the Multilateral Trading System

From Cancún to Geneva: Were the Optimists or Pessimists right?

Ailish Johnson and Dan Ciuriak[*]

On December 11-12, 2003, the Department of Foreign Affairs and International Trade (now re-named Foreign Affairs Canada and International Trade Canada) convened an informal roundtable of leading observers of international trade and investment for a discussion of the prospects for the Doha Development Agenda in light of the developments at the Fifth Ministerial Conference of the World Trade Organization at Cancún, Mexico, in September 2003. The objective of the roundtable was to obtain views on the prospects for the Doha Round, taking into account both the negotiating agenda and the geopolitical and international macroeconomic context, to discuss emerging issues that might affect the direction of the negotiations, and to identify areas where analytic work might facilitate further progress. Against the background of the collapse of negotiations at Cancún, this note provides a thematic summary of the discussions; a postscript compares and contrasts the expectations of trade policy specialists post-Cancún and the actual outcome at Geneva at the end of July 2004. As the roundtable was held under Chatham House rules, no attribution is given; responsibility for the interpretation of the discussion rests entirely with the authors.

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[*] Ailish Johnson is Senior Trade Policy Analyst, International Trade Canada, and Associate Faculty member at the Norman Paterson School of International Affairs, Carleton University. Dan Ciuriak is Senior Economic Advisor, Trade and Economic Policy and Trade Litigation, International Trade Canada. The usual disclaimer applies: the views expressed here are those of the authors and are not to be attributed to International Trade Canada or to the Government of Canada.

Preface: The Collapse at Cancún

The 5th Ministerial Conference of the World Trade Organization (WTO) in Cancún, Mexico, September 10 – 14 2003, ended without conclusion when Conference Chairman and Mexican Foreign Minister Luis Ernesto Derbez, having determined that it would not be possible to reach consensus across the agenda and on a Ministerial Text, gavelled the meeting to a close.[1]

In his closing remarks Minister Derbez emphasized that he had tried to conduct a transparent and open process, and that it was not until he had heard from the group of less developed countries[2] that they rejected any compromise on the Singapore issues (offered in late movement by the European Union) that he made his decision not to continue his consultations.[3] However, while the Singapore issues proved to be the rock on which negotiations foundered, a host of other issues on which agreement was never tested (most prominently agriculture) could as easily have played that role. Discord ranged over essentially the full slate of negotiating issues. In addition to the Singapore issues, WTO Members were also significantly divided on the modalities for each of the three pillars in agriculture (export subsidies, domestic support, and market access)—although a possible compromise shaping up for Day 5 of the conference was unfortunately never discussed due to the early halt of talks. These problems were compounded by a weak text on the flaring cotton subsidies issue, frustration over the continuing lack of progress on implementation issues, and uncertainty as to the flexibility that would be provided in the non-agricultural market access negotiations.

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[1] For a full summary of the Cancún conference see Bernard Hoekman and Richard Newfarmer, "After Cancún: Continuation or Collapse" in *Trade Note*, The World Bank, December 17 2003. Ministerial Participants, including the US, EU, Mexico, Brazil and Malaysia also offered their own views on Cancún in a collection *Where next for the WTO? After Cancún: Views, ideas and proposals by trade ministers*, (London The Federal Trust for Education and Research and Commonwealth Business Council, 2003). http://www.fedtrust.co.uk/uploads/FedT_CBC_Compendium.pdf

[2] This group, referred to as the G-90, emerged as a coalition of the least developed countries (LDCs), the African Union and the African, Caribbean and Pacific (ACP) group. For a perspective on its formation and aims from one of its members, see "Opening Remarks of the Minister of Foreign Trade and International Cooperation, Hon. Clement J. Rohee, at the Meeting of Ministerial Representatives of the G-90 in Georgetown, Guyana, 3-4 June", http://www.crnm.org/documents/wto/Opening%20Remarks%20by%20Hon.%20Clement%20J.%20Rohee%20G-90%20-%20Guyana.pdf, accessed 9 September 2004.

[3] The Singapore issues include: competition policy, investment, trade facilitation and government procurement.

A prominent feature of the dynamics that shaped the outcome at Cancún was the interplay amongst the various blocs within the WTO membership. The US-EU bloc, which had traditionally driven multilateral deals, was confronted with a powerful new group of dynamic trading countries in the form of the G-20 [4] and the assertive new alliance of largely poorer countries, the G-90.

No better indication of the power of new players and their alliances can be seen than the composition of the informal group called by Minister Derbez at Cancún early on the Sunday morning of the Conference. This initial meeting included the US, EU, China, Brazil, India, Malaysia, and Kenya. This group failed, however, to bridge significant gaps on a range of issues and a larger group was convened later on Sunday morning of about thirty countries including representatives of regional groups. The group discussed the Singapore issues for several hours without showing any signs of convergence. At this point, Minister Derbez determined that it would not be possible to develop consensus across the agenda, and chose to move to an early closure of the meeting.

However, no one issue can fully explain the failure to reach a Ministerial Text, nor was any one Member or alliance responsible for blocking progress. In the post mortems, the breakdown at Cancún was seen as boiling down to—variously—inadequate preparation (despite active ministerial engagement prior to the conference), a failure of leadership by the Chair and/or the major players, significant gaps in the level of ambition of the different players, and the inability of both traditional and emerging alliances to broker consensus.

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[4] This group actually included a fluctuating number of the following WTO Members during the Cancún conference: Argentina, Bolivia, Chile, China, Colombia, Costa Rica, Cuba, El Salvador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Turkey, Venezuela, and Zimbabwe. Post-Cancún US pressure has been brought to bear on several members, causing 'defections' from the Group including El Salvador, Colombia, Costa Rica, Guatemala; Thailand and the Philippines also came under pressure to distance themselves from the Group. Guatemala announced on 22 August 2004 its decision to rejoin the group (see: "Guatemala Volveria al G-20", Prensa Libre, Guatemala, Domingo 22 de agosto del 2004).

Yet, while the divisions and dynamics that led to the failure at Cancún were neither entirely unprecedented nor unanticipated,[5] the apparent severity of the frictions that brought the conference to an untimely and untidy close left trade policy practitioners and observers shaken and even dismayed.

It was against this backdrop, with prospects for a successful Round seemingly at a new low—and the direction of next steps highly uncertain, even as efforts were being mounted to restart the negotiations—that the Ottawa roundtable discussion took place.

Prospects for the Doha Development Agenda Post-Cancún: Thematic Summary of a Roundtable Discussion

The WTO post-Cancún: hiatus in negotiations revisited

History repeats, it was noted: we have yet another hiatus in a multilateral negotiation. Taking a longer-term historical perspective, there are two views of the Round: (a) fundamental shifts have transformed the negotiations; (b) we're in a normal cycle.

In support of the first view, it was noted that:

- The dynamics have changed with a shift in the power structure from the EU-US to include the BRICs[6].
- Coalitions/alliances have been rearranged; the Quad and the Cairns Group are "as good as dead" in one view, while new groups are forming. The key geopolitical development was the organization by Brazil and others of a bloc of developing

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[5] These dynamics were anticipated in, for example, Razeen Sally, *Whither the World Trading System? Trade Policy Reform, the WTO, and Prospects for the New Round*, Institute for Global Dialogue Occasional Paper No. 26, January 2003. Available at http://www.timbro.se/pdf/whither.pdf —accessed 08 September 2004.

[6] An acronym for the emerging markets of Brazil, Russia, India and China, although in this case Russia does not play, not yet being a WTO Member.

countries on agricultural trade reform (the G-20) and the US and EU trying to counter this with the five interested parties (EU, US, Brazil, India, Australia and sometimes Kenya).

- And the context has changed sharply: the real news to some is not the emergent commercial power of dynamic developing countries but rather poverty, the issue highlighted by the emergence of the G-90 and its constituent groups, especially the ACP, as more active players.

The second view draws on parallels to past GATT/WTO Ministerials (Brussels, Seattle, etc.) that failed; on this basis outcomes such as at Cancún can be seen as simply part of a normal part of the learning process of what it takes to put a round together. In support of this view, it was questioned how much of a power shift there has been: while China's accession has admittedly changed things, Brazil and India have been significant players in the trading system for quite a while. In any event, there was evidence of a power shift in previous rounds: the EU-US deal on "everything but agriculture" failed at the mid-term review of progress in the Uruguay Round at the GATT Ministerial in Montreal in 1988 when Rubens Ricuperio balked because he couldn't sell it to the Cairns Group (which presaged the Cairns Group rejection of the Blair House Accord of November 1992). Thus, this view asserts, it is not clear how much things are different now versus in the Uruguay Round.

In terms of the recent trend, the WTO is now reeling from, as one observer put it, three consecutive Ministerial "messes": Doha, it was argued, was as much a mess as Seattle and Cancún, just papered over as Members were driven by the need to demonstrate solidarity in the aftermath of the September 11th attacks. Yet it is also possible to see the story as perhaps less one of repeat failure than of evolution: at Seattle, developing countries gave a flat "no" to the deal, at Doha, it was a conditional "no", at Cancún there was a willingness to negotiate but not yet a "yes" to the offered deal.

From the point of view of the framers of the Doha Development Agenda (DDA), its construction reflected the bias in the existing system that had not given enough emphasis to the trade issues of greatest interest to developing countries. They set out to redress that bias by shifting the balance of benefits and, further, to situate the DDA in the broader development program with the IMF/World Bank. From the perspective of the developing countries, the interpretation was to redress their grievances with the Uruguay Round (e.g., limited trade gains for the poor countries and some losses due to TRIPs; the West had not lived up to technical assistance commitments). Some views were harsher: for the developing countries, it was all about special and differential treatment (S&DT) measures and defending eroding preference positions.[7] However, in the view of several observers, the heavy emphasis on development is now a major complicating factor in identifying the way ahead on the Doha Round.

Accordingly, some find grounds for optimism in the collapse at Cancún in the sense that this has set up a necessary cleansing of an overloaded agenda. A pared-down agenda that might emerge from the hiatus the WTO process subsequently entered might well prove to be more feasible. The past failures from over-reaching (labour at Seattle, the Singapore issues at Cancún) show that this is a risk for the WTO.

A complementary view from a sharply different perspective held that it is not so problematic that the process is not moving forward because the system is overextended as it is—especially the dispute settlement mechanism that is reaching deep into the economic, political and social institutions of sovereign states. For the US audience, especially conservatives concerned about sovereignty, there is a red flag in the parallel drawn recently in the press between the US bowing to the WTO decision on steel and Marbury vs. Madison, the 1803 decision that established the Supreme Court as the final arbiter of the US Constitution, able to force Congress and the executive branch to comply with its rulings.[8] Thus we are caught up, according to this view, on other unintended consequences of the Uruguay Round: political realism demands that the Round be simplified.[9]

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[7] But whether S&D is pro-development was questioned: S&D frees poor countries (unconstructively in this view) from adopting reforms that the West has already adopted and thinks would be good for the developing countries.

[8] Note: the reference is to David E. Sanger, "Bush decision puts steel in WTO's backbone", *New York Times*, December 5, 2003.

While these perspectives point some to the conclusion that, to re-ignite the Round, the focus will have to be the traditional agenda (including services), it was not clear to others whether a smaller agenda was necessarily the solution. Prior to Seattle, it was pointed out, the built in agenda was seen as inadequately broad to permit a deal. Now people want to simplify! Supporting this latter view, it was argued that business will not support the negotiations unless the Round has something worthwhile at stake—the major corporations are currently more interested in tax than trade; meanwhile the developing countries are more concerned about debt and development than trade.[10] The Doha Round thus finds itself much in the same position as the Uruguay Round: to get somewhere, the negotiations have to become bigger, the package broader. The WTO is in an awkward position unless there are gains to be had for all. It was argued that the resistance to a trade deal does not change whether the deal is big or small, but the extent of support does depend on whether more or less is on the table.

And then, it was pointed out, there is always the Tokyo Round solution of a broad multilateral agreement supplemented by plurilateral agreements. It might be that the Uruguay Round's "single undertaking" is the problem—recall again the notion of unintended consequences. In this vein, it was also observed that there is a little noticed positive trend in countries slowly adopting bits and pieces of WTO requirements without actually signing onto the obligations because they are not ready (e.g., Brazil has adopted the bulk of the telecom reference paper but not signed). A multiple speed WTO is a question that can be—and indeed was—raised.

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[9] Note: the issue here is not necessarily the DSU *per se* nor the fact that WTO agreements "reach inside the border"; rather it is the combination of the two—i.e., agreements that reach inside the border that might be subject to dispute settlement. In this context adding new agreements carries risks of widening the range of potential system frictions.

[10] To some extent, this reflects the extent to which past liberalization has not been fully "digested". Unilateral liberalization by developing countries in the 1980s and 1990s was described as three to four times deeper than that resulting from the GATT/WTO process. At the same time, much of this was carried out under economic duress and pressure from the international financial institutions. This liberalization was accordingly accompanied with contractionary policies that drove up unemployment, making it harder now to continue to liberalize.

An assessment of the Geneva scene post-Cancún suggested a subdued environment with all negotiating parties sitting in defensive mode and no interest at all in some of the negotiating groups. While one could see some elements that might drive negotiations (e.g., by one characterisation Brazil would engage if the EU/US move on agriculture; India has to move on industrial tariffs, and there is systemic value in the Singapore issues), some 50-70 countries were described as having minimal interest in the systemic issues and essentially nothing at stake other than the erosion of preferences and so they are questioning changes to the status quo.

In at least the one view, there is a danger here: the hiatus in the negotiations might not be used as a breathing space to develop a sharper agenda; rather it might well be used to harden the existing defensive positions.

The new structure and dynamics of alliances

If the answer to the Cancún collapse is to "repackage, rename, rebrand", there were also answers to be sought concerning what was described as the "deafening silence" on leadership. Which brings us to perhaps the most striking feature of the Cancún Conference, the new group dynamics and what these imply for the future of the negotiations.

As the fundamental transformation of the negotiating dynamics at Cancún showed, the most serious unintended consequence of the Uruguay Round—the north-south split—is becoming more complicated than at first thought. By one analysis, it is no longer just a simple north-south split but rather the emergence of 3 or perhaps 3 1/2 "blocs": The one or one-and-a-half refers to the US-EU alliance, which might or might not be functioning as a bloc; the G-20, featuring Brazil, China, India and South Africa, which emerged as a counterpoint to the trans-Atlantic bloc; and the G-90 supported by various non-governmental organizations (NGOs) which might not be clear as to where it is coming from on trade[11] but in many ways represents the real news, which is about poverty and the failure of development policies to deliver improved living standards in a wide range of poor countries (it was noted that some members of the G-90 have stopped referring to themselves as "developing", preferring to simply call themselves the "not-so-rich").

The G-20 came together only in the weeks leading up to Cancún, coalescing around opposition to the EU-US agriculture paper that had been submitted to WTO Members in August 2003, as opposed to through commonality of interests.[12] That the eleventh-hour EU-US proposal on agriculture at Cancún was blunted by the G-20 is significant.

The G-20 itself does not tend to see itself as a defensive alliance of trade recalcitrants; rather it sees the issue as one of sequencing, with the objective of unlocking agriculture as the key to progress on other issues.

Insofar as the G-20 was just about agriculture, coalescing as a negative blocking coalition against a bad deal and thus a one-issue grouping formed for essentially tactical purposes, it was argued that it would unravel if a good deal were put on the table. In this regard, the Cancún outcome might reflect in equal measure tactical negotiating mistakes on the part of the US: the US negotiators were said to have been hoping to be pushed back but others were slow to engage and the talks broke down before they were fully engaged, implicitly leaving the US with concessions to put on the table. The issue thus was less the shape of the final deal on agriculture, which was reasonably clear, but rather "how to get there from here?"

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[11] In part, this reflects the formation of the G-90 as a coalition of three smaller groups, the Africa Union (AU), the African, Carribean and Pacific Group (ACP) and the Least Developed Countries (LDCs), which have partially overlapping membership with each other but different focal points for their agendas. How the interplay among these groups within the G-90 and the interplay between the G-90 and other Members and coalitions will work out remains to be seen.

[12] At Cancún, Brazil coordinated and spoke for the G-20. China maintained a low profile, with the least ideological rhetoric, placing emphasis on its commercial interests across the core agenda. South Africa also has clear offensive interests in the agriculture negotiations, and in particular hammered on the devastating effects of EU export subsidies and US domestic support on developing country producers. India, on the other hand, appeared to be using the G-20 largely to resist market access liberalization.

But if the mother of the G-20 was agriculture, its father was said to be geopolitics. The US, it was suggested, did not see the G-20 coming—which was a shock. But while the US response was to vigorously counter the G-20, a good part of the US business community was described as wondering why the US is not siding *with* the G-20! By "selling out" in agreeing with the EU to maintain agricultural subsidies, the US committed, it was argued, a huge tactical mistake. In this context, the presence of the EU's trade negotiator, Pascal Lamy, and the absence of the US, at the December 2003 meeting of the G-20 in Brasilia did not go unremarked.[13]

The collapse of talks at Cancún was attributed by some as largely due to the lack of knowledge/understanding about the dynamics of this structure. Indeed, as one commentator put it, the US and EU at Cancún were like generals fighting the last war: they expected that, when they agreed on agriculture, the rest would fall into line. But this time it stimulated a reaction in the form of the G-20, which co-ordinated to develop common positions during the Cancún Conference, and thus effectively replaced the Cairns Group as the third force, alongside the US and EU in the agriculture negotiations, at least for the present.

A similar observation might be made about the tactics of the US-EU on the Singapore issues: unable to broker a deal during the informal pre-Ministerial process[14], this group came to

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[13] The communiqué from the G-20 meeting is available at: http://www.faologe.ch/webpage/G-20-12Dec03.doc (accessed September 10, 2004). The G-20 and Lamy also issued a short combined statement, "Joint Press Communiqué of the Meeting between the G-20 Ministers and EU Trade Commissioner Pascal Lamy", Brasilia, 12 December 2003, available at http://europa.eu.int/comm/trade/issues/newround/doha_da/jpc121203_en.htm. (accessed September 10, 2004).

[14] The question was rhetorically raised as to why the Singapore issues were on the agenda in the first place? Who wanted them? One story offered was that there was no real political or business support for the package; rather, the Commission wanted it to solidify its control over the EU agenda. These issues were cobbled together as a trap for its own members and ultimately the Commission got caught in it.

Cancún prepared for the usual all-night negotiating sessions and last minute horse-trading familiar from past Ministerial Conferences, as evidenced by the EU's last minute concession on the Singapore issues. But this approach completely mis-read the reaction of the poor countries and failed to understand the interplay between the issues. For example, the handling of the cotton issue by the US was part of the reason for the reaction against the Singapore issues (Botswana, it was observed, was not really against trade facilitation, but in the context of the negotiations, it rejected the issues as a group).

The G-20, it was argued, has opened up a big opportunity to redefine the negotiating structures: but this also leads to questions as to what the new model should be and who will lead? For example, the question was raised rhetorically whether the model might be the Quad plus Brazil, China and India. But, to answer this rhetorical question, it was argued that China paid at accession, India wants only Mode 4 (movement of persons) in services, Brazil wants agriculture but not investment. The EU and Japan, it was suggested, do not have a trade liberalization agenda. The US has not much of a trade reform agenda either, and not necessarily the right one: look at cotton. In effect, it was argued, how could this confluence of interests be integrated to yield a progressive trade agenda?

These problems are compounded by the defensive posture of many Members. In particular, developing countries that have invested heavily into industrial structures supported by, for example, the international regime for sugar have gained a vested interest in the protections in the system and face declining margins of preference under liberalization scenarios. Africa is overall in a very defensive posture and unsure whether to push the ACP or the WTO. Perhaps, it was suggested, the ACP would be the more productive route for Africa; but, by the same token, if Africa does not want to play in the WTO, it should not block progress by others.

One factor that has changed the dynamics of trade policy is that the developing countries at Cancún are not the same as those that participated in the Uruguay Round. From one perspective, depending on one's reading of the basis for the collapse at Cancún, there are grounds for optimism in that there was better preparation in the "south" for the Cancún talks. The fact that the south is better prepared, has a better sense of what are its interests, makes it a more difficult negotiating partner for the north—but this also makes the process more democratic. The inevitable consequence of democracy being "internalized" globally and more countries at the table being democracies is that it becomes more difficult to have quick results because each country has to deal with its domestic constituencies just as the north has long had to. For example, it was noted that there is now as difficult a political process in India to agree trade negotiation mandates as in the US (it was suggested that an overt sign of the growing complexity of the process in India is that, post-Cancún, India's trade minister emphasized the "give and take" of trade negotiations). Similarly, in Brazil, it was argued, the political base of the incumbent Lula Administration is labour—which influences Brazil's negotiating posture. The realization that domestic politics plays a role in emerging markets, not just in the industrialized countries, has not fully sunk in with all WTO observers.

At the same time, it cannot be ignored that reactions in the south to the breakdown at Cancún varied; in some quarters of the developing world, it was suggested, there was a declaration of victory. This leads to a pessimistic view: there really is a divide. If so, how can it be bridged?

Finally, it was argued that there have been important power shifts in terms of the composition of lobbies in industry, agriculture and services that also must be taken into account.

Time out needs to be taken, it was argued, from pushing the Round forward to have a profound discussion amongst WTO Members of the new power dynamics of the global economy.

No agreement on the objectives of the WTO

The lack of understanding of the dynamics of the new politics of trade liberalization was compounded by the absence of general agreement on the role and the objectives of the WTO.

The WTO, it was suggested, has an identity crisis: after the transformation from the GATT, its first Director General, Renato Ruggiero, wanted a flag, a logo, even a tie. But these are the trappings—what is the WTO really all about? Making the world safe for capitalism? That, it was noted, is a hard sell.

Two general "takes" on this question were offered in the course of the discussions:

First, if the WTO needs a big vision: why not global free trade? Preferences are eroding anyway, so it makes sense to be inside the WTO (although there are also valid questions about the need to be in the WTO: China and Vietnam were very successful in development outside, as Vietnam continues to be today).

Second, recalling that Kindleburger, in his analysis of the Great Depression, remarked that no one was looking out for the system, it was suggested that the big gap today is similarly the lack of a coherent idea of where to go: the WTO negotiations are part of a broader context of policymaking bearing on the question: what kind of world do we want?

But while the concept of the multilateral trade system as a "constitution" for the global economy has at times been mooted,[15] it was not clear to many observers whether the main action is in the WTO, or indeed whether it should be; some have doubts about such visions, seeing the institutionalisation of the GATT in the form of the WTO as a big mistake. Some see multilateralism as having peaked; its golden age behind us, and even in something of a downturn. First, there are only modest incremental gains to be made. Second, the large economies such as the US and EU see themselves as able to do better one-on-one—a hub-and-spoke model that is a risk for medium-sized economies, which traditionally have seen their interests better served in a multilateral setting.

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[15] This idea has been developed by trade law scholars. For example, see Academy of European Law: *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, available online at http://www.ejil.org/journal/Vol12/No1/art1-01.html. The controversial nature of this idea is highlighted by the reaction to the publication of a comment allegedly made by WTO Director General Renato Ruggiero at Chatham House in 1998, in connection with the OECD's initiative to create a multilateral agreement on investment (MAI).

There are, of course, some advantages to regional trade agreements (RTAs): the chances of concluding arrangements for income transfer (e.g., the EU's structural adjustment program), technical support, and new issues (e.g., investment, customs cooperation and trade remedies) are greater in RTAs than in the WTO. RTAs thus may be better suited to deal with deeper integration issues. Progress on investment, which has proved intractable in the WTO context, is being made through bilateral investment treaties (BITs), of which there are now hundreds. And dispute settlement on investment issues is proliferating: Argentina, it was said, has some 20 investor-state lawsuits on the go. This activity is very real in establishing the *de jure* framework for investment and it is all outside the WTO.

At the same time, the downsides of this approach need to be taken into account for these developments fragment the system. As well, while it is an option for those economies being courted (e.g., the Central American countries negotiating FTAs), those *not* being courted (e.g., much of Africa) are not able to advance through this approach. Conversely, the American business community, which is a key constituent for any trade deal, does not see much payoff in the small bilateral deals such as those with the Central American states or Australia, etc. American business interests, it was argued, are in China, India and Brazil; the US can't deal with these countries and the issues they pose in bilateral contexts.[16] The failure to advance to the next stage of the Free Trade of the Americas (FTAA) process at Miami, it was argued, was a warning that the US will find as much difficulty on the regional front as in the multilateral negotiations. In point of fact, it was argued, the bilateral tactic is simply a threat, a bluff. And, for good measure, the same holds for the developing countries—south-north trade and investment is where it's at.

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[16] The counter example of the US one-on-one deal with China in the context of China's WTO accession raises some doubt about this claim; in effect, it was suggested, the US-China deal represented a bilateral agreement. This observation reopens in a sense the question of why the US business community mobilized to make the Uruguay Round happen and why it is on the sidelines today: the implied answer is that, given enough substance on the negotiating table, business interests will engage.

In terms of the "big picture", it is dangerous, it was argued, to be complacent about the situation of world trading system: the *status quo* is not sustainable. Ultimately, there needs to be some clarity about what is desired from the WTO. The lack of business support means that politicians are not getting pushed. Views diverge about what the WTO is for (commerce vs. development) and what it is (an organization or a set of commercial agreements). While it is clear that the WTO cannot be reduced to the DSU, it is less clear whether the multilateral agenda should be larger or smaller. Without a clear vision for the WTO, there will continue to be erosion of support for it. In that sense, the system is really at a crisis point and it is not clear what will happen.

In this regard, a parallel was drawn between the situation of the Doha Round post-Cancún and the Uruguay Round post-Montreal. If such a parallel does indeed exist, this would suggest the need for a political re-launch at the next WTO Ministerial Conference in Hong Kong, China, that would reflect the clarified aims.

The NGOs revisited

A third factor behind the collapse was the failure of the trade community to fully internalize the change to a public negotiation, which was largely driven by the integration of the domestic and international agendas. From this perspective, it was suggested, one might better pin the blame for failure on the negotiators rather than on the system.

Here the role of non-governmental organizations came up for debate. NGOs' engagement on trade was a response to the broadening of the trade agenda. Governments were organized internationally, as was business, and NGOs followed suit.

The small "c" conservative view was that governments are the *only* legitimate players in governance, the others are merely lobbyists. The broadening of the interest groups playing on the trade agenda is simply a broadening of the lobby groups. Nation states decide who is on their delegations and if they choose to bring the lobbyists in, so be it. However, the government reaction to "bring them inside the tent"—as some delegations were said to have done in bringing NGOs to Cancún, amid rhetoric about "harnessing globalization"—has not necessarily worked out as governments might have expected: the NGOs, it was argued, have their own agenda and governments are losing the public relations battle to them. Thus, it was the NGOs that pushed debt relief, as well as the AIDS and essential medicines issue; Oxfam is now making the case for trade liberalization on textiles and cotton. The shift in the over-arching "story" of the WTO from a focus on commercial gains to a focus on poverty, at least in the public's perception, was the result of NGO communications. It is not clear to some observers that this is fully understood by developed country governments.

At the same time, the issue of NGO "accountability" was raised: "Who are these guys?" it was rhetorically asked.[17] And who do they represent? For example, it was argued that Canadians are not where NGOs say they are on trade—Canadians support commercial agreements; at the same time Canadians do care about social impacts.

Government responses were characterized as having been weak and inadequate. Thus, it was observed, while it has been a while since one could say "What's good for GM is good for the US", the Sierra Club has sold the idea that "What's good for the Sierra Club is good for America". In this context, successful completion of the Doha Round will be difficult enough; ratification, if we get there, even more difficult.

A rather more sanguine view about the communications issues is based on the observation that opinion swings because views in the general public are shallowly held—tweak the question a bit and the answers change markedly.

Others see the issue not as being one of communications: the source of conflict in views between civil society and governments over globalization was described as deep and fundamental. Recalling Keynes' comment about being slaves of a defunct economist,[18] the conventional government view of the world (and the WTO) is that of Ricardo; the civil society view is closer to that of Marshall, Pareto and Weber.[19] Economists do not recognize society as an entity and so social critics dismiss economists' views as unreconstructed 19th Century thinking. If there is no progress in the system, do we just accept this? NGOs, for example, are going beyond representative democracy; they want participatory democracy.

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[17] Even NGOs, it was suggested, are questioning NGOs—for example, the NGO *Sustainability*, which perhaps unfortunately for this argument turns out was started by business interests, is questioning other NGOs' role in the trade sphere.

And substantively, there are real issues. Markets have distributive effects within countries and across countries. What the EU and US have to bargain away (e.g., elimination of export subsidies and trade-distorting domestic support in agriculture) is good for developing countries. But, given that winners drive the deal, the problem in the Doha Round is that, given what is on the table, India doesn't yet see itself as a winner in services, Brazil in agriculture or China in manufacturing. Many countries in Africa don't see themselves as winners anywhere. Meanwhile, for their part, the EU and the US have not addressed their internal distributive questions.

In this latter regard, there is a new trend within the social sciences towards development of macro models that include a social context, with social transition costs for structural adjustment. Such models can show trade liberalization driving negative outcomes for some groups, compared to economic models that do not reflect such costs. Trade is an inherently redistributive policy, but it not transparently so: is there a plan to compensate the losers? This is the crux of the NGO's social issue.

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[18] "...[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slave of some defunct economist."—John Maynard Keynes, *The General Theory*.

[19] That is, the conventional view is held to focus purely on efficiency—the Ricardian focus—versus on distributional issues that were introduced by later economists.

The way ahead

The 2005 target for concluding the Doha Round was always unrealistic because of the political cycle and especially because of the farm budget cycle. In this regard, the Cassandras, it was argued, turned out to be right![20] The next farm budgets in the US and the EU will be different: in the US because of the fiscal pressures, in the EU because of the pressures of enlargement. In time, it will be less difficult to move forward on the Round.

While several argued that little can be done in moving negotiations forward until after the US election and the EU Commission changes, it was generally seen as important to use the hiatus as a window of opportunity to educate all parties—the developing as well as the industrialized members—as to what is *potentially* on the table in order to give the new leadership something to work with. It was noted that, with everyone playing defence, it is hard to have a trade negotiation: the Geneva agenda has to focus on identifying what are the *offensive* objectives.

From a process perspective, it was argued the trade community needs to get serious about June 2007 and the expiration of US Trade Promotion Authority (TPA) as the real deadline for negotiations. Working backwards, timing-wise, the deal has to be put together by middle of 2006 in order to allow the Round to be concluded by mid-2007. Given that there is an intellectual deficit on how to deal with the various fundamental stumbling blocks, this is not a lot of time. Thus, there is no certainty that they can be resolved by then.

Outside Geneva, it is time to have the discussion of the big picture concerning the WTO: what is it all about? We have to revisit the issue of safeguards alongside anti-dumping and countervailing duties (AD/CV). We also need some honesty in the objectives – discussion of "implementation" and S&D has generated expectations that cannot be met – better to come clean now, it was argued, than to wait until the eleventh hour and risk having excessive expectations in this regard torpedo the Round then.

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[20] Cassandra was a Trojan woman (daughter of Priam and sister of Paris) cursed by Apollo to prophesy the truth but never to be believed. Before and during the Trojan War, Cassandra predicted the disaster that the war would visit on Troy, and as per the curse, no one believed her. Indeed, she was considered insane. Being proven right was cold comfort for Cassandra who was taken off to become the wife of Agamemnon, a match that ended unhappily for all. One hopes that those who foretold an unhappy outcome at Cancun do not face her fate!

Part of the engagement should be through mini-ministerials, which to some extent constitute the model for advancing trade negotiations today, maintaining political engagement on the issues between the formal Ministerial Conferences. And given the integration of domestic and international agendas, there is also, it was argued, a need to involve people from capitals, and not leave the negotiations largely to WTO Ambassadors.

One view on the necessary and sufficient conditions to relaunch: process commitments, a "rule-making peace clause" (as argued by *The Economist*), the Derbez text to be resuscitated, and the EU and US to be upfront on agriculture subsidy cuts (at least in a hortatory sense). This, it was argued, would improve the climate.

Postscript: The Geneva Surprise

Against all apparent odds, the WTO General Council established, of 31 July 2004, in line with its stipulated deadline, a negotiating framework for the Doha Development Agenda (see Box 1). It is of no small empirical interest to measure this agreement, and how it was achieved, against the variety of predictions made for the future of the Doha Round negotiations just months earlier, as described above.

Above all, the July agreement gave a much-needed boost, both in substantive and psychological terms, to the negotiations. Repackaged, yes, but not renamed and arguably not rebranded. And well before the US election, the EU Commission change and the Hong Kong China WTO Ministerial on which many had already focussed their expectations.

The process that led to the agreement also highlights the some lessons learned from the Cancún experience, and confirms the entrenchment of new dynamics in the negotiating process.

- First, at no time before the end of July was agreement a "done deal". The EU and US made it clear that their commitment rested on the contribution of others, in particular other developed and higher-income developing Members.

- Second, new key players, in particular the G-20 led by Brazil and India, and the G-90 group centred in Africa, held regional meetings and issued statements on evolving draft texts; their input was vital to building a final deal. The G-90's engagement reflected the perception among its members that they had been blamed in some quarters for being "cannot do" rather than "can do" countries, and for failing to allow negotiations to advance at Cancún; they would not be put in such a position again. In the case of India, there was also measure of good fortune in the support voiced by the new Congress-led coalition government for progress in the Round.[21]
- Third, the formation of the informal group of "Five Interested Parties" (FIPs)—the US, EU, India, Brazil, and Australia, and also joined by Kenya—which played a key role in framing the deal on agriculture and actively "selling" it in Geneva, reflected the recognition by the US and EU of the G-20's power to block agreement on the core issue of agriculture and thus constituted the next evolutionary step of the Cancún dynamic between the EU-US on one hand and the G-20 on the other.
- Fourth, the Cairns Group was in the background and the Quad was not in play at the ministerial level; Geneva seems to have sounded their death knell.

All this evidence seems to reject the theory of "same old, same old" espoused by some in December; the Doha Round *is* witnessing the evolution of new power dynamics that may well be with us for some time and the full elaboration of which we may not yet have seen. Attention to these new dynamics, and their role in shaping political and technical solutions, will be vital to the eventual success of the Round.

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[21] The new Congress-led coalition government under Manmohan Singh, a trained economist, replaced the incumbent BJP in India's 2004 general election. The support voiced by the incoming government for the Doha Round is seen as confirmation that it offers real reform to developing countries. For a commentary on the implications of the democratic transition in India, see for example "Briefing on the 2004 Indian General Elections: the Way Ahead", Center for International and Strategic Studies, Washington, June 7, 2004; at http://www.csis.org/saprog/040607summary.pdf; accessed September 10, 2004.

By all accounts of the process leading to the July agreement, the fine arts of diplomacy and negotiation have firmly reasserted themselves. After several Ministerial Conferences (Seattle, Doha, and Cancún) where brinkmanship reigned, the emphasis was on continuous top-level political engagement and hard work at the technical level to crunch difficult issues and bring parties together. The symbiotic relationship between the political and negotiating processes was clearer in the April to July 2004 period than ever before in the Round, giving credence to those who said a failure at Cancún was necessary to demonstrate not only the value of the WTO to the trading system at large but also the dangers of holding back and expecting final-hour reciprocity deals to yield a conclusion to the Round.

The "deafening silence" on leadership spoken of in December in Ottawa was broken. There was careful shepherding of the 2004 process by US Trade Representative Zoellick and EU Trade Commissioner Lamy, both at the top of their games and eyeing possible legacies. Zoellick's letter to Ministers of January 2004 was seen as a dramatic and successful kick-start to the year, especially after a lack-lustre December 2003 General Council that failed to pick up the pieces of Cancún. Lamy's attempt to pick up the pen with fellow Commissioner Fischler in May was perhaps less successful in setting the right tone, raising the spectre of a confrontation of who, exactly, would get the Doha Round "for free", but was no less a boost in that it committed the EU to an historic breakthrough on agriculture if "parallelism" from major players was also on the table.

By the same token, Cancún effectiveness of the US-EU partnership which was the driving force of the Uruguay Round thus again proved to be a necessary—although no longer sufficient—condition for forward movement in the Doha Round. Some things don't change.

But other things do.

In Ottawa in December, it was argued that, alongside coalitions, there was a need for a new core "ginger group" to drive things. Some saw this as a formal consultative group that would in some sense represent a cross-section of Members or larger coalitions in which issues could be debated. A ginger group did emerge in the form of the FIPs; but it emerged as an informal and not a formal mechanism. Provisionally, this is a setback for institutional architects and ammunition for chaos theorists who would see the WTO as a "complex adaptive system" that spontaneously generates new (and often surprising) intermediate structure in an evolutionary, bottom-up manner. Whether this mechanism can transcend agriculture and extend leadership to the Round as a whole is the next key question.

As regards the structure of the negotiating agenda, those who argued for a paring down of the agenda could take satisfaction from the decision to remove the three most controversial of the Singapore issues from the Doha negotiating agenda; those who argued for more on the table could take satisfaction from the deepening in the core agenda of market access in goods and services. Those who emphasized the importance of the core agenda were proven right.

There was much emphasis placed in the Ottawa discussion on the importance of taking advantage of the apparent hiatus in negotiations to "sweat the details" in refining the negotiating frameworks on non-agricultural market access, agriculture and services. This intuition proved to be correct. In the lead up to the July decision, the timely release by various groups and Chairs of draft texts provided enough lead time to review, add to, and eventually consolidate these texts into a viable framework. This preparatory work was centred in Geneva around the activity of negotiating group Chairs and their informal consultations with Members.

Emphasis was also placed in the Ottawa discussion on the importance of the "mini-ministerial" process. This process too was active in the lead up to Geneva. Meetings of the FIPs in London and of key clubs or regional groups, such as the G-20 meeting hosted by Brazil, the OECD Ministerial Conference in May and the ACP and G-90 in July, added momentum and provided opportunity for political engagement without the pressure of a formal WTO Ministerial.

In connection with this last observation, the contrast between the contexts for ministerial engagement in Geneva versus in Cancún warrants comment. In contrast to the atmosphere of Cancún, Geneva featured smaller green rooms, much smaller national delegations, and largely minister +2 formats for negotiation. The trimmed down complements from the industrialized countries created at least a semblance of greater balance with the developing country presence, a factor which itself improved the tone for a round in which engagement of developing countries with limited institutional capacity for negotiations is an issue. Similarly, the absence of pomp and circumstance was more in keeping with a round in which the issue of poverty is central. Business lobbies, the NGOs and the media were all there in Geneva—the Geneva process did not succeed because somehow it flew "under the radar" of those interested in negotiations. But it is tempting to attribute at least part of the success of the Geneva to the general toned down feel of the process compared to that which tends to prevail at full-blown Ministerial Conferences. Perhaps there are lessons to be drawn for organizers of future Ministerial Conferences.

As regards business engagement, it appears that pressure from industry groups was only weakly felt in the NAMA negotiations; this continues to be problematic from the perspective of achieving an ambitious outcome involving significant market access concessions and/or complementary sectoral agreements.[22] Business interest was felt more keenly in the services negotiations, where US and Indian service providers, joined by Canadian and EU interests, pushed for services to be given a mandate for a second request-offer process. In light of recent concerns over "outsourcing" in the US election campaign, India may see the GATS negotiations as its best chance for preserving the services growth that is driving its broader economic development.

In the end, the final Agreement came after a marathon negotiating session, and even then there was a dramatic pause to allow members to confirm the acceptability of the text before it was confirmed by consensus at a meeting of the General Council.

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[22] Progress in the NAMA and other groups was hampered by the slow pace of movement on the agriculture text. This reflects the concern with "balance" in these other areas and the agriculture outcome. Slow movement on agriculture, despite engagement at all levels, thus left others groups waiting with little guidance as to how to push forward their own areas.

So, were the optimists or pessimists right?

It is clear that the most pessimistic who prognosticated that the Geneva process, having failed to reach agreement on modalities, was about to fail to agree on a framework were in that particular prediction wrong. In the final analysis, however, no-one could truly held to have been right: what the Geneva outcome really showed was that there is still room for surprise in the world of trade which brings together a complex interplay of actors, of disciplines (including economics, politics and law) and of circumstances. Even the optimists did not see light at the end of the tunnel so soon. The pessimists meanwhile did not have confirmation of their sense of crisis. And both optimists and pessimists anticipated that the basis of any future success involved a greater departure from the Cancún text and contextual conditions than actually was necessary.

In the end, the July 31 General Council Decision reflects deployment of a technique well known from past negotiations: creative ambiguity. The frameworks for agriculture and NAMA are not as ambitious as the Cancún "Derbez text" in that they provide less guidance to negotiators, and thus more ambiguity regarding the outcome of the next and more substantive phase of negotiations. While the text leaves open the possibility of an ambitious outcome, less detail also means less assurance. Much heavy lifting remains to secure modalities and, eventually, a conclusion to the Round.

The ambiguity means that the points raised by the pessimists have not been definitively put to rest. In particular, in the United States, renewal of the Trade Promotion Authority (TPA) and WTO review are on the slate for the Spring of 2005 in an uncertain political context. TPA is automatically renewed from June 1, 2005 to June 1, 2007 unless the US House or Senate votes a majority resolution of disapproval. The record on trade of the incumbent Republican Administration has been mixed; few analysts expect a Clintonian "compete not retreat" approach under a new Democratic Administration. Complicating factors are legion, including potentially differing attitudes to multilateral agreements—which might be coloured by Congressional reaction to several important WTO dispute settlement decisions that have gone or might go against the US, including the recent authorization of retaliation against the US in the Byrd Amendment dispute, the softwood lumber decision and upcoming decisions on GSP, cotton, the Canadian Wheat Board and genetically modified organisms (GMOs). Other complicating factors include the differing electoral bases of the two parties, the evolving macroeconomic circumstances (especially on the balance of trade), and developments on the complex US bilateral and regional trade agenda (which has been linked into US security policy under the incumbent Republican Administration). In the latter regard, the US continues to pursue its slate of bilaterals, meaning that dynamic of increasingly complex and overlapping rules giving rise to choice of forum issues and the US picking off economies one by one on "new issues" such as TRIPs-plus obligations will remain with us.[23]

Negotiators have many new dynamics and pressures to deal with in the post-Geneva landscape: the increased role of a diverse number of developing countries, the expanded trade agenda that touches on highly sensitive issues and social values, the persistent demands from NGOs to be brought into the policy-making process, and the greater transparency of negotiations and public awareness of trade deals. The fact that a successful conclusion to the July negotiations came at the price of postponing clinching agreement on the most controversial issues, such as a firm date to eliminate export subsidies, a solution for cotton, reform of trade remedies and differentiation across developing countries, means that eleventh-hour brinkmanship and diplomacy may still characterise the conclusion to the Round, if and when that day arrives.

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[23] This very real issue is exemplified by developments over investment rules in the US-South African Customs Union (SACU) free trade negotiations. SACU members (South Africa, Botswana, Lesotho, Namibia, and Swaziland) have signaled their reluctance to include an investment chapter, in part, according to reports in *Inside US Trade* because the US proposed text is more detailed than what the US has demanded in previous free trade agreements, in part because of the differing investment provisions across SACU members which makes for a difficult negotiation. See "U.S., SCU Disagreements on FTA Negotiations Delay Next Round of Talks", *Inside US Trade*, September 10, 2004

However, the mere fact that a July outcome was reached confirms the optimist perspective that Members not only value the WTO but also see their way towards effective compromise through new forms of leadership. A historic and real reform of agriculture is on the table. Still, the substance of the agreement is on the table and not in negotiator's pockets. The optimists have still not won the day.

Box 1: Highlights of the July 2004 General Council Decision

Agriculture: The framework provides for:

- the elimination by a date to be agreed of export subsidies (including export credits with repayment periods beyond 180 days);
- a tiered formula for overall "substantial reductions" in trade-distorting domestic support;
- reform of the blue box and review of the green box criteria;
- a "down payment" during the eventual implementation period; and
- substantial improvements in market access from all Members, other than LDCs, alongside flexibility for sensitive products.
- cotton reached an effective compromise, pursuant to which a sub-committee of the agriculture special session on cotton will be set up wherein negotiations will take pace, giving cotton a priority..

Non-agricultural market access (NAMA): the framework outlines a non-linear formula to reduce or eliminate tariff peaks, high tariffs, and tariff escalation and leaves open the possibility of sectoral agreements.

Services: A "revised offer" process for services was endorsed with a formal deadline of May 2005.

The Singapore Issues: Multilateral negotiations were launched on Trade Facilitation, while the other three Singapore issues were dropped from the Doha negotiating agenda.

Development:

- reiterates centrality of development, and provides for ongoing work on special and differential treatment (S&DT), implementation-related issues, technical assistance and capacity building.
- development mainstreamed throughout the core negotiating areas by providing for S&DT.

Differentiation between developing countries: this has been left to the next phases of the negotiation.

Next Ministerial Conference: Hong Kong, China has been confirmed for the next Ministerial Conference in December 2005.

Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?

Robert Wolfe[*]

Introduction

Can politicians contribute to the management of the trade regime, both at home and in the World Trade Organization (WTO)? Put differently, must national politicians play a role in developing a consensus among participants in the process of global governance? These questions have theoretical significance for students of negotiation and democracy as well as of international relations, but they also matter to practitioners. The Canadian Prime Minister in a major speech on global governance asserted that "The problem with many of today's international organizations is that they are not designed to facilitate the kinds of informal political debates that must occur."[1] Paul Martin stressed the dual importance of political leadership to the functioning of international organizations, and the requirement for politicians to lead the process of adaptation at home, a role they can only play if they understand what is happening abroad. The role of politicians may be especially important in the trade regime as WTO rules increasingly address matters once thought to be safely behind the border.

Occasions for "informal political debates" may now be more frequent than Paul Martin imagines, though perhaps less effective than he might wish. At the June 2004 meeting of the WTO Trade Negotiations Committee, held to assess progress in getting the Doha Round back on track, the Director-General reported that he had recently attended the Third LDC Trade Ministers Meeting in Senegal, the OECD Ministerial meeting in Paris, the Conference of the African Union Ministers of Trade in Rwanda, the meeting of APEC Ministers Responsible for Trade in Chile, and UNCTAD XI in Brazil (WTO, 2004b). He did not mention his presence at a "mini-ministerial" in Paris, or at a ministerial meeting of the G-20 in Brazil where the trade minister of Guyana was also present in his capacity of coordinator of the G-90.[2] And this set of meetings covers just May and June 2004.

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[*] Associate Professor, School of Policy Studies, Queen's University, Kingston, Canada, K7L 3N6, wolfer@post.queensu.ca . I am grateful for the suggestions of Dan Ciuriak, John Curtis, Richard Janda, Kim Nossal, Peter Ungphakorn and Shinji Kinjo; for the logistical assistance of Liette David; for the research assistance of David Steinberg, and Brad Adams-Barrie; and for the insights of the WTO officials and national delegates who patiently answered my questions in confidential interviews. The views expressed are my own and not to be attributed to International Trade Canada or the Government of Canada.

[1] "Prime Minister Paul Martin speaks at the World Economic Forum on "The Future of Global Interdependence"" Davos, Switzerland: January 23, 2004 http://pm.gc.ca/eng/news.asp?id=31 accessed January 27, 2004

These proliferating meetings alarm critics who think that negotiations are the responsibility of officials in Geneva, that too many meetings become a distraction, that many of the meetings are not transparent, that some ministers are on a perpetual circuit of meetings, and that the smaller meetings constitute a self-selected ad hoc steering group with no legitimacy. Realists wonder, if the success of a trade round depends on objective interests alone, or on business lobbies, or on macroeconomic conditions, then what can politicians contribute, in large or small groups, especially if the power of the largest countries always trumps?

I explore these issues in the context of two inter-related sets of informal ministerial meetings centred on the WTO. The first comprises occasions when ministers responsible for trade have an *informal* discussion about matters affecting the trading system. I show that there are a great many such meetings at which discussions of the WTO are only loosely connected to the organization's *formal* processes. The second comprises informal meetings of a small group of trade ministers held to provide leadership for the trading system. I show that such so-called "mini-ministerials" were once rare, but are now frequent. I then begin the process of asking whether all this activity makes a difference to the diplomatic task of finding a consensus in multilateral negotiations.

In the next section of this Chapter, I describe the evolution of ministerial engagement, informality, and small group meetings in the trading system in order to provide a context for the following section, in which I provide detailed empirical information on practices since the creation of the WTO in 1995, showing that the role of ministers is now extensive. I devote particular attention to the rise of cross-group "mini-ministerials". In the fourth section, I assess the significance of these developments for the WTO. Do these meetings help the WTO contribute to transparency, legitimacy, or knowledge in the trade regime (Kratochwil and Ruggie, 1986)? This paper is a descriptive attempt to delineate some political phenomena that seem interesting. Subsequent papers will explore the broader context of WTO reform (Wolfe, in progress), and the theoretical importance of "informal" meetings. I conclude for now that the emergence of new players and more complex issues means that the proliferation of informal ministerial conversations is likely to continue in some form.

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[2] All acronyms are spelled out in the annexed Tables.

The consensus puzzle

All WTO decisions are taken by consensus, an essential diplomatic practice given that virtually all WTO agreements form part of a Single Undertaking that Members must accept or reject in its entirety. The evolution and interpretation of WTO rules depends on diplomatic negotiation not majority vote or court dictate, which is why the search for consensus remains the central decision-making problem. Consensus as a decision rule in a large group places a high burden on the chair or the secretariat, who must find the zone of likeliest agreement (Kahler, 1993). In this Chapter, I focus on the consensus problem in negotiations for new rules, and not on the process of overseeing and implementing existing WTO obligations. The political issues on which such consensus is needed include whether to launch a new round, what issues the round should contain, and whether the draft agreements should be accepted in the end. I am especially interested in mini-ministerials as an attempt to contribute to the solution to the consensus puzzle. Three techniques often used to help build consensus in large complex organizations such as the WTO, which now comprises nearly 150 disparate Members, are embodied in mini-ministerials: they involve politicians, are limited to a small group, and are held in an informal setting. In this section I briefly explore the evolution of these three inter-related techniques and the familiar tensions to which they give rise.

Political engagement

The GATT as an interim agreement drafted pending the entry into force of the Charter of the International Trade Organization (ITO) was not given any institutional structure—it simply evolved through practice, notably in its dispute settlement procedures (Winham, 1998). Early GATT rounds were mostly reciprocal tariff negotiations coordinated by officials. Ministers rarely met under the GATT's auspices from the Havana Conference of 1948 that approved the ITO charter until the launch of the Kennedy Round in 1964.[3] They did not meet again until the Tokyo ministerial meeting that launched the Tokyo Round of multilateral trade negotiations in 1973. Fragmentation of the system was a major concern nine years later at the GATT ministerial of 1982. That meeting was the first held to provide general leadership for the system,[4] although it failed in the attempt to move towards a new negotiating agenda. At the Punta del Este ministerial of 1986 that launched the Uruguay Round, ministers agreed that the Round's Trade Negotiations Committee could meet at ministerial level "as appropriate." Full plenary ministerials have been held every two years since, with the exception of 1992.

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[3] The GATT Contracting Parties met at ministerial level in 1957, a meeting noted for setting in motion the Haberler Report; and again in May 1963 to launch the Kennedy Round (the actual negotiations were initiated at the May 1964 GATT Ministerial). For backgound see WTO High Level Symposium on Trade and Development: Background document, Geneva, 17-18 March 1999; at pp 12-13. As well, it was not unknown for ministers to head delegations to sessions of the Contracting Parties; for example, Canada's Minister of Trade and Commerce, C.D. Howe, headed Canada's delegation to the Eighth Session of the Contracting Parties at Geneva in September 1953. See "Memorandum from Secretary of State for External Affairs to Cabinet", Ottawa, September 4th, 1953, Documents on Canadian External Relations, Volume #19 - 422.

[4] The use of ministerial representation at sessions of the GATT Contracting Parties to give political impetus to the system was not, however, entirely unknown. It was, for example, already in evidence as early as 1956 as reflected in the rationale given for attendance by a Canadian minister at the Eleventh Session of the Contracting Parties in October 1956: "It has been suggested that a meeting of Ministerial representatives at this Session would serve to strengthen the prestige and effectiveness of the GATT." See *Note du secrétaire d'État aux Affaires extérieures pour le Cabinet*, [Ottawa], le 2 octobre 1956, Documents on Canadian External Relations, Volume #23 - 810. My thanks to Dan Ciuriak for drawing these forms of ministerial engagement to my attention.

Ministers launched the Kennedy and Tokyo Rounds, but those rounds were concluded by officials. Ministers not only launched the Uruguay Round, they pushed it along and then concluded it. But plenary meetings were insufficient on their own to sustain the negotiations: additional political engagement was necessary. The US Trade Representative and the EU trade commissioner were central political figures, as always. Leadership by the G-7 (now G-8) summit, which had been crucial in knocking its own members' heads together to provide sufficient leadership to bring the Tokyo Round to a conclusion, was again essential. The Quadrilateral Group of Trade Ministers (the Quad), established at the 1981 G-7 Summit, met regularly at ministerial level and frequently at officials' level to discuss the Round.[5] Since the creation of the OECD in 1961, its annual ministerial has been an occasion for informal concertation on GATT and WTO matters among its members. Many other meetings of ministers played a role in the Uruguay Round negotiations, from UNCTAD and the G-77 through the Rio Group, the Group of 15, APEC, and ASEAN to the Commonwealth and la francophonie. Successive Directors-General of the GATT and WTO consciously made use of such meetings to foster political engagement, air the issues, and educate less-involved ministers. As we will see below, ministers continue to find a great many such occasions to discuss the WTO, but reaching consensus remains difficult.

Informal meetings

The WTO has an elaborate formal structure of committees of officials that report to supervisory bodies of ambassadors that in turn report to the Ministerial Conference. This biennial ministerial is the ultimate decision-making body for all aspects of the WTO, and it is the ultimate authority for the conduct of new negotiations, but its decisions do not emerge from speeches made in plenary sessions. The second part of the solution to the consensus puzzle in the WTO is to hold "informal" meetings. Among the informal working methods used at the Ministerial Conference are the practices that first emerged in rough form at Punta del Este of having open-ended meetings of "Heads of Delegation" and of assigning a small number of contentious issues to "friends of the chair" for exploratory talks. These open-ended meetings chaired by ministers (now called "facilitators") are attended by any Member with an interest.

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[5] Participants were the European Commission (which has EU competence for trade policy under Article 133 of the Treaty), the US, Japan, and Canada. At the time they were the world's four largest trading entities. The Quad has not met at ministerial level since 1999, but officials still meet.

These techniques are common in international organizations. Some informal meetings follow established rules of procedure, but others do not (for a discussion, see Lydon, 1998). Informal meetings of duly constituted bodies can be announced in advance with a firm agenda, as when the WTO General Council meets as Heads of Delegation. Other meetings may never be announced. Some meetings are open to the public, press, and civil society organizations, and some are open only to a select group of members of the international organization. Some can be private and unofficial meetings of a regular body that follow many of its normal procedural rules, but with no written record; others can be *ad hoc* and unscripted. (It is clear that Martin thinks that leaders need more of this last sort of meeting: "The most fruitful exchanges between leaders," he said in Washington, "often take place in the corridors of great meetings, one on one, far removed from the actual agenda. When leaders do meet in international fora, it is difficult to break free of the "Briefing Book" syndrome and get down to brass tacks, to thinking outside the box."[6])

In the WTO, where the term is in common usage, "informal" means at a minimum that the meeting is unofficial, or "off the record", unlike formal meetings, when all Members may attend, and minutes are taken. Formal meetings are held largely for the record, since much of the real work has already been done informally. (Many delegates note, therefore, that opening formal meetings to civil society organization observers could do no harm.) Chairs draw from a rich menu of informal techniques for building consensus, from open-ended consultations with all Members to one-on-one "confessionals" between the chair and ambassadors. Most formal meetings of officials in Geneva are now mirrored by a larger number of informal meetings. The nearly 400 formal, official, meetings of WTO bodies in 2001, for example, were easily exceeded by the 500 informal meetings of which the secretariat was aware.[7]

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[6] "Address by Prime Minister Paul Martin on the occasion of his visit to Washington, D.C." April 29, 2004.
http://pm.gc.ca/eng/news.asp?category=2&id=192, accessed July 7, 2004.

Talking off the record, often in private, is essential. After three days of informal meetings of the agriculture negotiating group at the end of June 2004, the chair provided an informal assessment to a formal session. Sources report that he said he was treading a delicate balance between the need to be transparent and to include everyone in the negotiations, and the need to let difficult ideas develop before exposing them more widely. "A newly planted, delicate flower could wilt and die if it is exposed to too much sunlight," he said. The more intense the divergence of opinion, the more that compromise must be explored in private. In short, as the EU stressed in its contribution to the 2000 debate on internal transparency, WTO decisions should be made in accordance with the provisions of Article IX of the Treaty, but "informal consultations" are an essential part of developing consensus (WTO, 2000a). While some of these consultations are open-ended, many are limited.

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[7] Note: the WTO Conference Office calculates meetings on the basis of half-day units; accordingly, a full-day meeting counts as two meetings. In 2001, there were 67 official WTO bodies, including 34 standing bodies open to all Members, 28 accession working parties and five plurilateral bodies. The informal meeting total did not include 90 other meetings such as symposia, workshops and seminars organized under the auspices of WTO bodies. (WTO, 2002b)

Small group meetings

When the number of active participants in multilateral trade negotiations increased dramatically in the 1980s, experience confirmed the well-understood proposition that the legitimacy gained by involving large numbers of participants comes at the expense of the efficiency associated with small numbers (Kahler, 1993). The third part of the solution to the consensus puzzle, therefore, is the old technique of holding meetings in smaller groups. One former GATT official called it the "expanding-and-shrinking-concentric-circle-approach," in which issues may be broached in a plenary, but smaller groups meeting in private do most of the work (Patterson, 1986).

During the Kennedy Round of the 1960s, GATT Contracting Parties developed a number of informal negotiating devices. One was the practice of negotiating market access bilaterally among "principal suppliers" and then extending the results to all participants through the "most favoured nation" principle (MFN). Given the large difference in economic weights of participants, some major deals began life in small meetings of the most significant participants—the so-called "bridge club" of the US, the EEC, the United Kingdom, Japan, and Canada. Even then, delegates from smaller Contracting Parties felt excluded (Winham, 1986). Trade rules and domestic policies began to come to the fore in the Tokyo Round, but the decision-making structure was still "pyramidal" (Winham, 1992), with the largest players still negotiating agreements among themselves, then discussing the results with others. This "minilateral" process conserves negotiating energy, but makes it impossible for smaller countries to influence the results. Not surprisingly, therefore, most developing countries did not sign the minilateral "codes" that came out of the Tokyo Round. (On the Tokyo Round agreements, see Winham, 1986.)

The other familiar manifestation of the "concentric circles" approach was the gradual emergence of "Green Room" meetings. (This term for small group meetings in a WTO context comes from the early days of the GATT when the Director-General would call a meeting of the most-interested parties to a negotiation in his boardroom, known from its colour as the Green Room.) The Director-General still convenes Green Room meetings of ambassadors in advance of major meetings of the Trade Negotiations Committee (TNC) or the General Council to explore where consensus might be found on thorny issues. At the 1988 Montreal ministerial, contentious issues were first discussed by small groups of officials, continuing the Geneva Green Rooms, and then by similar limited groups of ministers (Croome, 1995).

The inner circle only became controversial after the first WTO ministerial in Singapore, when a Green Room of 34 countries left all the other ministers loudly wondering why they had come. Contrite promises to ensure it would never happen again led to no changes (Blackhurst, 2001; see also Blackhurst, 1998). The anger erupted at Seattle in 1999, where the conflict inside the hall was much more serious for the health of the WTO than anything that happened in the streets (Curtis and Wolfe, 2000). A lengthy debate on internal transparency led to new procedural understandings (see the chair's report in WTO, 2000b), but developing countries were still unhappy with how the 2001 Doha ministerial was subsequently prepared and conducted, when the final compromises were again hammered out in a Green Room, which led to further debates about WTO procedures before Cancún.

One persistent response to the institutional weaknesses of the trading system has been an attempt to regularize a small group forum:

- The ITO would have had an elaborate institutional structure, including an Executive Board designed to be representative of the Members of "chief economic importance" based on shares of international trade (Hart, 1995). A similar body was also envisaged in the 1955 draft "Organization for Trade Cooperation," an unsuccessful attempt to remedy the GATT's institutional defects (Jackson, 1990).
- A senior officials group was created in 1975 during the Tokyo Round as the *Consultative Group of Eighteen*, known

as CG-18.[8] CG-18 was a fertile source of new trade policy ideas in the Tokyo Round, but during the 1980s it gradually fell into disuse. Some thought a group of 22 (as it was by 1987) too large to be effective or too small to be representative.

- In the 1980s, the group of eminent experts who provided some of the ideas that informed the preparations for the Uruguay Round recommended the creation of a ministerial body whose limited membership would be based on a constituency system (GATT, 1985). Developing countries wary of the "Security Council syndrome" resisted proposals to create a successor group to CG-18, whether of officials or of ministers.
- The American proposal of a Management Board, made before the WTO idea emerged in 1990, was seen as especially "hegemonic" by some developing countries (Croome, 1995; and see the chapter on the negotiating group on the Functioning of the GATT System in Stewart, 1993). Nevertheless, many observers of the new organization thought that some such group would be needed (Ostry, 1998; 2002; Jackson, 1990; Jackson, 1995; Schott and Watal, 2000; Blackhurst, 2001; Wolfe, 1996). European and Canadian officials have often returned to the idea of creating such a group at least at the level of capital-based senior officials, if not of ministers (WTO, 2000a; Lamy, 2004; Canada, 2000). Such a group has not been created.

What we observe in the WTO search for consensus is a tangled mix of ministers, capital-based officials, and ambassadors, meeting in formal and informal settings, both in plenary and small groups. In practice, there is no evident agreement on which combination is best. In the next section I look at one aspect of current practice, the apparently growing role for ministers in informal small groups.

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[8] CG-18 was established July 11, 1975 (GATT, BISD 22S/15); made permanent November 22, 1979 (GATT, BISD 26S/289); and has been in suspense since 1988 (GATT, BISD 35S/293). The last meeting was held 21-22 September 1987.

Informal ministerial engagement in the WTO

Political leaders in the era of globalization seem to spend much of their life going to international meetings. I first try to separate ministerial meetings related to the WTO from the general background noise of global collective life (Table 1). Next, focussing on the period between the Doha and Cancún Ministerial Conferences, I try to separate occasions for general informal political engagement in the trading system from occasions for a smaller group to exercise leadership (Table 2). I then describe which countries participate in the smaller groups, and I describe the demographic characteristics of such countries (Table 3).

When I began surveying the multitude of trade-related meetings, I established a number of boundary conditions in order to delimit a manageable set for analysis. I was looking for multilateral meetings (defined as three or more participants) at the level of ministers or vice-ministers where the WTO was an explicit topic. Table 1 includes the annual WTO Ministerial Conference as a landmark, but my interest is in meetings where the aim is either to prepare ministers to participate directly in the WTO, or where the purpose is to provide direction to officials in Geneva.[9] That is, I looked for meetings of small groups (less than the full WTO membership) aimed at building consensus in the WTO where participation was political and the setting, with respect to the WTO, was informal. The ministerial meetings of interest fell in four groups.

- In the first group are meetings held for another formal purpose (like the Group of Rio, August 2001) where informal consideration of WTO matters is an explicit topic of discussion. Of course many of these meetings take place in part for just such a purpose—coordination of multilateral action is part of the raison d'être of the G-8 and the Commonwealth, to take just two examples. As mentioned above, such meetings have been used to discuss trade issues for a long time.
- The second group describes the newer phenomenon of meetings either of existing groups (SAARC commerce ministers

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[9] Note that I did not include UNCTAD meetings.

August 2001) or ad hoc groups (Making Trade Work for the Poor, May 2003) held to discuss WTO matters.

- A third group includes ministerial meetings of WTO sectoral coalitions, and regional groups, which often mirror meetings of ambassadors in Geneva.[10] The Cairns Group has been meeting at ministerial level since Punta del Este, and since Cancún the G-20 has also begun to meet at ministerial level, but ministerial meetings are now increasingly popular with regional groups like the separate but overlapping groups of African countries; African, Caribbean and Pacific Group of States (ACP); and Least-Developed Countries (LDCs). These three have begun to hold ministerial meetings before WTO Ministerial Conferences to establish their positions, often on the basis of sub-regional meetings of groups like CARICOM (Bernal, et al., 2004, p. 24). At Cancún, these three groups began to meet together as the G-90. (The origins and success of developing country coalitions during the Uruguay Round and early years of the WTO are analyzed in Narlikar, 2003.)
- A fourth group, meetings held to provide leadership for the WTO, includes informal meetings of ministers or senior capital-based officials where participation rather than being sectoral or regional is meant to be somehow representative of the full WTO Membership. These meetings, highlighted in **bold** on Table 1, have come to be called "mini-ministerials", perhaps because in function and in their scaled-down membership they mirror the formal Ministerial Conference, although they also resemble the current Green Room meetings of ambassadors in Geneva.[11] The mini-ministerials between Doha and Cancún are considered separately in Table 2.

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[10] For a discussion that separates such developing country groupings into formal groups or alliances, informal issue-based groups, and "grand alliance" inter-group alliances, see (Bernal, et al., 2004pp. 12ff).

[11] The table does not include the Green Room meetings of ministers that were a central feature of the Singapore, Seattle, Doha and Cancún ministerials because lists of who participated are impossible to obtain. The lists probably resemble those for the mini-ministerials, however.

- In the spring of 2004, another form emerged, what some journalists called "micro-ministerials"—meetings of a handful of ministers representing differing regions and interests in the negotiations. What distinguishes this type of meeting is that the participants, rather than being like-minded, as in the Quad, for example, represent the central opposing interests in the negotiation. The only instance so far is the "Five Interested Parties" (FIPs).
- Finally, the last entry in Table 1 is even more unusual. At the end of July 2004, ministers from 25 countries, and a great many more capital-based senior officials, attended a regular meeting of the General Council where normally Members would have been represented by their ambassadors.

The *first observation* to be made on the data in Table 1 is that informal political engagement in the trading system is now extensive. Ministers from all regions have occasions every year for an informal discussion of WTO matters both in meetings called for that purpose, such as the meeting of LDC trade ministers in July 2001 in Zanzibar, which discussed an LDC position on the Doha agenda; and on the margins of meetings called for another purpose, such as the CARICOM meeting in Jamaica in July 2003 where WTO matters were discussed.

The *second observation* to be made is that the number of mini-ministerials is increasing rapidly.[12] I am not aware of any such meetings in 1993 or 1994 during the intense process of ending the Uruguay Round and creating the WTO. One such meeting took place before the WTO's First Ministerial in Singapore, but none was held before the Second Ministerial in Geneva. There were three such meetings between Geneva and the Third Ministerial in Seattle, and three before the Fourth Ministerial in Doha in November 2001, for a total of seven "informal" meetings of ministers and/or senior officials during the first 6 years of the WTO. In the two years between Doha and Cancún, the focus of Table 2, there were eight such meetings, including the sessions on the margins of the OECD ministerials. Only one has been held since Cancùn, the third (annual?) meeting on the margins of the OECD ministerial council.

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[12] I am still trying to find information on the small number of such meetings during the Uruguay Round, and on the so-called "Invisibles Group" that met during the early years of the WTO.

Small group meetings may be important for building consensus, but they are also contentious, not least with respect to the participation criteria. The criteria for sectoral coalitions and regional groups are generally self-evident, but civil society critics claim that the selection criteria for mini-ministerials are unknown (Kwa, 2002b), that the meetings comprise "unrepresentative groups of members, generally hand-picked by the major powers to promote their agendas.... A core group of about twenty to twenty-five members attend all the most critical meetings, in effect constituting a de facto executive council, to which members have not agreed, by the back door (Jawara and Kwa, 2003, p. 280)."

Having identified the set of mini-ministerials, the next question is whether participation is random or shows a pattern. Table 3 lists all the countries that attended at least one of the 15 meetings that meet the mini-ministerial criteria between the creation of the WTO on January 1, 1995 and the Fifth Ministerial Conference in Cancún in September 2003. I counted 32 Members that attended at least one of the first set of seven meetings, and 21 Members that attended at least three. Thirty-eight Members attended at least one of the second set, held between Doha and Cancún, and 24 Members attended at least four of those meetings. It seems that a core group of regular participants has emerged.

I then wanted to understand the characteristics of both frequent and occasional participants. Membership in a small group might be a function of a country's weight in the world, or its capacity to influence others (Malnes, 1995). Relevant indicators might therefore be: Gross National Income (GNI) per capita; share of world trade; membership in regional trade agreements; membership in WTO coalitions; holder of WTO chairmanships or other leadership roles; and the size of the Member's permanent delegation in Geneva. (The likeliest predictor of participation in informal meetings might be the relevance of the discussion to the national economy, which is certainly a factor for participants in sectoral coalitions. Here the issue is the trading system as a whole, which is why I picked the first two indicators.

The last two indicators suggest whether a country has the trade policy capacity to participate effectively at this level.) Table 3 describes what seem to be the relevant characteristics of the countries that attended at least one of the second set of meetings. Table 2, which focuses on the eight informal ministerial meetings held between Doha and Cancún, incorporates data from Table 3 to analyze participation on the basis of the regional groups and leadership roles of participants.

The *third observation* to be made is that participants in mini-ministerials are broadly representative of the regions of the world, of countries at different levels of development, and of relevant coalitions. All the participants have a mission in Geneva (many smaller Members do not) and most missions are sizeable, suggesting that most participants have the bureaucratic capacity to support the search for consensus. Table 2 omits data on the wealth and trade share of participants because the meetings tend to show a similar pattern in these respects. Of the participants at the November 2002 Sydney mini-ministerial, for example, ten were high income countries, three upper middle income, five lower middle income and six lower income, according to World Bank data. Looking at their share of world merchandise exports, four countries were in the top ten (taking EU members individually), six were in the top 20, and five more were in the top 30 world traders. Of the remaining nine countries, seven were below number 50 on the list.

The *fourth observation* to be made is that the core group of frequent participants tends to include the richest and largest traders, as one might expect. In a regime based on reciprocity, leadership must come from the biggest traders. Any agreement that the most significant traders would ignore is hardly worth having. But mini-ministerials should not be confused with the "minilateralism" of the Tokyo Round and before. The first set of informal meetings I describe involve all Members in varying combinations in a process of learning about the issues, and contributing to transparency about each other's intentions with respect to different aspects of the agenda. Participants in the smaller group meetings are not crafting minilateral codes that will later be extended to other groups. Arguably it was just such an older negotiating concept that led to the failure of the OECD's attempt to negotiate a Multilateral Agreement on Investment. The mini-ministerials are meant, in principle, to try to find a political consensus that will be acceptable to the full membership.

The *fifth observation* to be made is that additional small countries appear to be invited because they currently chair a WTO body, or coordinate a regional group—no consultation would now be held in Geneva without such participation. In effect, smaller participants seem to be selected as a kind of "contact group" responsible for keeping others informed. (This and other principles of delegation to small groups are canvassed in Kahler, 1993, p. 320.) Those involved are delighted; those left out are hurt. But, one LDC delegate confirmed in an interview, "we are consulted ahead of such meetings and debriefed after, so we sort of accept the process."

The *sixth observation* is that all of these relatively objective criteria leave the participation of some countries mysterious—why is Lesotho invited, for example? Some ministers are invited, cynics suspect, because they or their country are a "darling of the west", or of the leading ministers, or even of the host. Others are invited because a long-serving minister is seen as especially capable. Personalities count it seems, at the margin, even though overall the selection criteria for creating a broadly representative group seem clear and consistent.

The *final observation* is that the active engagement of ministers in informal meetings continued after Cancún, but only one mini-ministerial was held. And then many regular participants in mini-ministerials were represented by ministers at the July 2004 meeting of the General Council, although everyone insisted that meetings were not to be referred to as a "mini-ministerial". It is worth pausing to ask if the events of July 2004 represent a new pattern or were a special case.

A special case of political engagement?

The reason for the intense political activity in the first half of 2004 was the need to repair the damage to the Doha Round. After the Cancún collapse in September 2003, most meetings of negotiating bodies in Geneva were cancelled. An attempt to complete the

Cancún agenda in December at a meeting of ambassadors in the General Council failed. That meeting had been preceded by intense informal consultations among officials in Geneva conducted by the Chair of the General Council. In its aftermath, ministers were active again, especially the EU and US ministers, who visited a great many colleagues individually and in groups. Ministers sent each other letters, they had corridor conversations at other meetings, they held special meetings of ad hoc groups (for example, in Mombassa), and they had a couple of *de facto* mini-ministerials. There was also an EU/G-20 meeting. This activity, which was not in any sense "inside" the WTO, created a situation in May 2004 where ministers began to see the possibility of completing a new framework for the Doha Round by the summer of 2004. As the outline of a possible package appeared, a consensus gradually emerged that a full-blown Ministerial Conference was not needed to accept the package. Rather, a decision of the General Council at its regular mid-year meeting would provide sufficient authority for a new framework for the negotiations.

Creating the package, however, was not straightforward. The central challenge was crafting a substantive framework for future negotiations on agricultural reforms. The key agriculture gap to be bridged was on market access, where the EU-US paper of August 2003 was blocked at Cancún by the creation of the G-20, but the G-20 had yet to offer a counter proposal because its two leading members (Brazil, an exporter, and India, an importer) have opposed interests. But market access is not the only issue, and those Members are not the only players. The complicated dance began when the EU, Kenyan, South African and Brazilian ministers met in London on May 1, 2004 at the invitation of their American colleague to consider how to break the deadlock in agriculture. Next, according to press reports, the EU, US Brazil, India and Australia (the NG-5 some said—NG for non-group because not like-minded) began meeting among officials to try to bridge the gap. This meeting of the Five Interested Parties (FIPs became the accepted informal description of a group that does not formally exist) then decided to meet at ministerial level in July, as did the Africa Group, the G-90 and the G-10. Officials met every few weeks in the agriculture negotiating group, but Ambassador Groser of New Zealand, the chair, had to wait to put out a compromise text until he had an idea of where the FIPs would come out, because no agreement would be possible without them. Despite consultations between FIPs members and the coordinators of other WTO negotiating groups, notably the G-10 and G-90, who unlike the Cairns Group are not represented in the FIPs, many delegates were decidedly unhappy with the possibility of a fait accompli emerging from this process. (For more details, see Bridges, or Inside U.S. Trade, and see the communiqué issued by G-10 ministers who met in Geneva on July 5, 2004.)

The Director-General and Ambassador Shotaro Oshima, the chair of the General Council, finally released a draft of the proposed decision by the General Council on July 16 based on texts developed by the chairs of the other aspects of the negotiations. The General Council was scheduled to begin meeting on July 27, but everyone knew that the meeting could extend until July 31. The chair of the General Council made it clear that this was a regular meeting, not a mini-ministerial yet ministers from 25 countries, and a great many more capital-based senior officials, attended the meeting where normally Members would have been represented by their ambassadors. Nevertheless, the chair and the Director-General did not convene any meetings restricted to ministers. Whatever delegates did, however, was up to them.

The meetings of the last week of July followed a familiar WTO pattern. The full General Council convened only for the record. Heads of Delegation meetings were convened to provide transparency about developments in more informal process and to see if there would be strong negative reaction to a text. Members met in a variety of informal, small group meetings, beginning with the FIPs who locked themselves away from Tuesday to Thursday on agriculture. Rumours about what they were doing on this central issue led to a good deal of discontent being voiced at a Thursday Heads of Delegation meeting. Developing country and civil society critics of informal WTO processes noted with amusement that Canada and Switzerland, regular participants in mini-ministerials and the Green Room, were especially vocal in their unhappiness with the FIPs.

In the event, when a Green Room meeting on agriculture finally began on Friday morning, run by Ambassador Groser, it was clear that he had kept control of the text. While the FIPs had sorted out their own differences, scope remained for others to ensure that the text was acceptable for them. The Green Room was a mixture of ministers, senior officials, and ambassadors. The Africa Group, LDCs, G-33, and G-90 spoke through their coordinators, responded to changes more quickly and effectively than before, and played a constructive role, although the G-90 was only cohesive on preference erosion. The only significant complaints afterwards came from some small Latin American countries, who not being ACP members, were not represented in the Green Room, and so were taken by surprise on some changes to the agriculture text.

Do these events represent a special case, or an example for the future? It is perhaps not surprising that the presence of the leading ministers was necessary. Members were trying to agree on what was not agreed at a Ministerial Conference. Without political engagement in the preparations, and then in the final bargaining in Geneva, it might not have been possible to reach agreement. The process was an ad hoc adaptation to exceptional circumstances, but one should be leery of drawing lessons because similar circumstances may not arise again.

Assessment

Ministers have more opportunity in the trade regime to meet informally in groups of varying sizes than Paul Martin might have imagined. But do these meetings make a difference, and are they legitimate? Making a difference might mean advancing a negotiation, or contributing to transparency about each actor's intentions, or contributing to the diffusion of knowledge in the trade regime (Kratochwil and Ruggie, 1986). Legitimacy might be assessed by considering the merits of the criticisms.

The entry for each meeting in Table 1 contains brief information on what was discussed, often on the basis of a communiqué circulated to all Members as official WTO documents (for one example of many, see WTO, 2004c), but mini-ministerials are informal, and off the record, so much of the information in

Table 2 comes from press reports. As well as documents, therefore, this assessment is based on confidential interviews I conducted in Geneva in June 2004.[13] Three separable questions arose when I started asking WTO officials and delegates about how all this political activity happens, and what difference it makes: 1) is informal political engagement useful in general? 2) do the proliferating meetings make a contribution? and 3) are mini-ministerials, as a particular manifestation of informal ministerial meetings in small groups, effective and legitimate?

Is informal political engagement useful in general?

The extensive debates among WTO Members about appropriate procedure, especially since Seattle, may mask a profound disagreement about democratic public administration. Leaving aside the difficult issues about how developing countries can participate in Geneva, the question is, should ministers be involved in the WTO at all, even at the formal Ministerial Conference, let alone in more informal ways? Some developing countries oppose involving trade ministers directly because ministers are already engaged in providing negotiating instructions for Geneva delegations. With WTO rules adding matters once safely behind the border to its agenda, however, Renato Ruggiero, the second Director-General, argued for more active and frequent political engagement, and for the WTO to develop a political constituency in member countries.[14] The WTO's first Director-General implicitly disagrees: while agreeing with the critical view, Peter Sutherland recalls that "When I first became director-general of the GATT I made it quite clear that I wouldn't have any meeting of trade ministers until negotiations were completed and we had everything signed up. I didn't think there was much point in bringing 100 ministers together in Marrakech to negotiate. They came to sign something that had already been agreed. The actual work had been done beforehand in Geneva." (Sutherland, 2004) But Sutherland knows that that position is not sustainable—ministers now have a formal role in the Ministerial Conference. Perhaps it should formally be a rubber stamp, but it can only rubber stamp decisions participants understand. How can such understanding emerge?

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[13] I interviewed WTO officials and a small but representative sample of delegates from rich, middle-income, and least developed countries, from the north as well as the south, in the Americas, Asia, and Africa. The sample included Members who are both frequent and rare participants in mini-ministerials, and regular participants in the G-20, G-33, G-90, Cairns Group, and the Like-Minded Group.

[14] WTO Focus 9 (March-April 1996).

WTO issues are complicated, and ministers have to know the issues if they are to take decisions. Delegates believe that ministerial meetings are educational for the participants—if the minister stays in the job. Some countries leave their trade minister in place for years, which allows the more experienced ones to brief their colleagues—ministers like anybody else learn better from their peers, and it helps when their counterparts in other regions educate them about the realities elsewhere. Participating ministers learn more about all the possibilities, about the causal connections between issues, and about the views of others, thereby helping the emergence of an eventual consensus at a formal meeting and their own ability to explain the necessary compromises to the public at home. The difficulty of actively involving less well-informed ministers in negotiations, however, is that when they do not know the issues, they may restrict their interventions to generalities and may be uncomfortable accepting offers or making concessions the value and implications of which they cannot assess intuitively, thereby impeding the process.

Ambassadors and experts have an opportunity to meet every day, one delegate observed, which is not the case for their political masters, some of whom only attend a Ministerial Conference every two years and even the more active have only a handful of other occasions annually to meet their fellow ministers. In this light, many delegates thought that changing to an annual Ministerial Conference would be a good idea. When they meet every two years, the agenda is over-loaded. Having a Ministerial Conference every year would allow for a smaller, more focused agenda. The Ministerial Conference could then contribute to building consensus on managing the organization and negotiating new rules—but the challenge of building consensus at the Ministerial Conference would still remain, and the resulting informality would still come at a price.

Critics allege that shifting the action away from formal decision-making is a shift away from a process of formal equality towards bilateral horse-trading (Jawara and Kwa, 2003, p. 181). It is then said that side deals can be used to coerce developing country agreement, fragmenting developing country coalitions. The often cited example is a change in Pakistan's WTO position around the time of the Singapore mini-ministerial of 2001, supposedly because of offers of financial support from the US and EU. It is at least plausible to suppose, however, that that money was proffered not to gain agreement at the WTO, but as part of enlisting Pakistan's support in the Bush Administrations newly-launched "war on terror". Power is often a factor affecting the positions countries adopt in the WTO (Jawara and Kwa, 2003, Chapter 6). This news disappoints people who think that rules and institutions are a shield from power, but power is always present, and the weak have few alternatives. Would small developing countries find it easier to deal with the US outside the WTO? Does anybody think that in a reciprocal bargain, opposing the interests of the largest players is cost-free? Is it surprising that developing countries get something they want (for example the ACP waiver at the Doha ministerial) in return for something that the developed countries want? Nevertheless, while it can be hard for developing country coalitions to resist coercive pressure (Narlikar and Odell, 2004), the G-20 showed at Cancún what they can do when they combine their forces to wield collective power. In any event, involving ministers does not alter the structural basis of the power in question—the US delegation will be powerful whatever the institutional setting.

A related critique is that by "by shifting the discussion from the ambassadorial to the ministerial level, they take it out of the hands of those closest to the issues, politicizing the process and opening the way to arm-twisting and pay-offs in fields unrelated to trade (Jawara and Kwa, 2003, p. 280)." Paul Martin might respond that that is precisely the point: politicians with their wider responsibilities are able to make cross-sectoral compromises not open to officials. Some developing country ambassadors think that it is not right that politicians should be pressured to undercut their officials—it is claimed that at the Doha Ministerial, certain developed countries attempted to drive a wedge between the bureaucrats and politicians from developing countries. As one ambassador is reported to have described Doha (Narlikar, 2004), "Some of the ministers didn't even support the position that the ambassadors had taken up in Geneva." But when I explored the question of a "wedge" with delegates in Geneva, most were skeptical that the problem was widespread. One said "My minister always briefs me on exchanges he has with other ministers." Another asked, "How can you drive a wedge between ambassadors and ministers? We are on the phone all the time to [the capital]; there is no gap."

Are all ambassadors in touch with their ministers? One delegate said that his country had good inter-departmental coordination mechanisms in the capital, with the results of regular meetings reported to the Geneva delegation so that they know the thinking at home. "We have a regular flow of information," he said, "and we send reports back, that are circulated." He was doubtful, however, that delegates from other countries in his region were always properly briefed for meetings. In a study of this problem, the OECD found that trade policy knowledge is limited in most LDCs and many other developing countries, both in trade ministries and among other government officials. Not surprisingly, therefore, "Trade policy co-ordination is weak in many countries. Responsibility for trade-related policies is often dispersed across different ministries. ... Ministries of foreign affairs usually take the lead in trade negotiations and staff WTO missions, but they often lack expertise on trade issues and have only limited roles in the formulation of trade policy back home (OECD, 2001, pp. 32, 34)." Many developing country ambassadors are not players on the substance of trade policy at home, lack good communications with their capital, and also have to cover meetings at UN international organizations in Geneva.[15]

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[15] Does "professional culture" affect WTO negotiations? Ahnlid did not find much impact of this variable on Uruguay Round services negotiations (Ahnlid, 2003), but is there a gap between trade and foreign ministry people, and between ambassadors who spend all their time at the WTO and those who must spend a great part of their effort on UN agencies? Put differently, does the trade policy community have an institutionalized way of thinking

The result, whether or not intended, is that informal meetings may well drive a wedge between ministers and their ambassadors. That is not good if it creates bad relations between ambassadors in Geneva, but it can be good if it encourages a closer alignment of the ambassador's thinking with that of the minister.

In sum, informal ministerial engagement is useful. The attendant difficulties for developing countries are ones of overall administrative capacity, which cannot be solved by making the WTO more rigid for all its Members. Indeed the capacity problem may actually be alleviated by fostering even more informal off-the-record occasions where ministers and senior officials can learn from each other without having to adopt public positions.

Do proliferating informal ministerial meetings make a contribution to the WTO?

What is the relation between the proliferating informal meetings of ministers and the formal WTO process? I had been surprised initially by the large number of meetings I found when I was constructing the universe for Table 1. As mentioned above, it was clear during the Uruguay Round that negotiators could use any occasion when ministers came together to help push the formation of a consensus in Geneva. The new dimension is the growing popularity of meetings held specifically for a WTO purpose, and especially the growth of such meetings among Africans and other LDCs. Some WTO coalitions, like the Cairns Group and the Quad, have long held ministerial meetings as well as meetings among senior officials and ambassadors, although Quad ministers have not met since 1999. Regional groups of developing countries, and the LDC group, now coordinate among Geneva ambassadors, they have ministerial meetings, and since Cancun they are working together at ministerial level as the G-90. But does all this activity make consensus any easier to achieve?

One difficulty is that the message does not always stay the same when countries meet in their regional groups, in coali-

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(Douglas, 1986) that shapes how they understand the nature of the problems and the nature of negotiations? This mode is obvious to those who grew up professionally within it, but might be less obvious or even alien to others.

tions, or in mini-ministerials. One example cited was the differing position taken by Kenya at the February 2004 meeting in Mombassa with Pascal Lamy and Robert Zoellick, and in the May 2004 meeting in Kigali with their African Union colleagues. Another difficulty arises when the desire to adopt a joint position gets ahead of genuine ministerial engagement with the substance of the issues. Too often the ministers are asked to endorse a document largely written by their ambassadors in Geneva, which the ambassadors then wave in negotiations claiming an inability to move off the rigid position endorsed by ministers.

The interaction between a regular WTO meeting, an informal and ad hoc meeting of Geneva officials, and informal meetings of ministers can be seen in discussions of whether "trade facilitation", one of the four so-called Singapore issues, would be moved from the work program to full negotiations. An informal "core group" of developing countries discussed the issue for months after Cancún, before reportedly taking it from Geneva to be "further fleshed out" at meetings of LDC ministers, African ministers, and G-90 ministers.[16] It is known that much of the declaration for that May 2004 meeting of African ministers in Kigali was drafted in Geneva by experts, some of whom went to Kigali to work on the final text. Subsequently, Mauritius, speaking at a WTO meeting on behalf of the African group, stressed the conditions that African ministers wanted met, as signaled in the Kigali declaration, before their ambassadors would agree to negotiations on trade facilitation. And then Nigeria on behalf of the Africa Group laid down a formal marker for the preparation of the all-important July 2004 framework package meant to re-start the Doha process after Cancún (WTO, 2004d) stressing that "the political guidance and common African negotiating objectives are provided by the Kigali Declaration.... It is our expectation that this important contribution by the African Ministers will be appropriately reflected in the text of the July package."

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[16] BRIDGES Weekly Trade News Digest Vol. 8, Number 13 April 8, 2004.

One thing is clear: these meetings do not help if nobody is listening. At the LDC meeting in July 2003 in Dhaka, ministers said they did not want to negotiate the Singapore issues. Then ACP ministers in Brussels said the same thing.[17] Then we get to Cancún where, as one delegate recalled, the EU was "shocked" by the rejection of the Singapore issues. What was it about "no" before Cancún that EU ministers did not understand?

This complicated interaction between ministers and officials is normal in the diplomatic culture of Europe and North America, but is relatively new for many developing countries. It can be sterile, if it is merely a device to obstruct or delay the WTO process. But it can also be enormously productive and exciting if it is the leading edge of a revolution in developing country engagement in the trading system. The process leading to the adoption of the July framework agreement on the Doha Round (WTO, 2004a) allows both interpretations.

Are mini-ministerials effective and legitimate?

If we accept that informal, political engagement in the system is valuable, can the mini-ministerials be defended as a legitimate and effective technique?

Start with legitimacy. Civil society and academic critics sympathetic to the LMG perspective make a number of claims about the mini-ministerials in addition to the criticism, discussed above, that they are unrepresentative. The meetings are said to play a critical role in determining the outcome of negotiations by allowing the EU and the US to extend their vision of a package beyond the Quad (Jawara and Kwa, 2003; see also Kwa, 2002a). In a widely circulated petition protesting the Sydney mini-ministerial in November 2002 (Kwa, 2002b), these informal meetings were said to be fundamentally flawed because "no written record is kept of the discussion; decisions are made that affect the entire membership and the agenda is set on their behalf and in their absence; and finally, an attempt is made to build consensus on critical WTO negotiations by a select group which de facto and illegally takes leadership of the organisation." Smaller Members attending a mini-ministerial or a Green Room can allegedly be bought with side deals, allowing larger participants to present a package to the rest of the membership on a take it or leave it basis.

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[17] There were actually 11 developing country statements that touched on the Singapore issues prior to Cancún(Bernal, et al., 2004, p. 21).

I think that this critique misses the mark; indeed the critique might be better founded if applied to Geneva Green Rooms, the subject of a different paper. Written records are not kept of most WTO meetings now, partly because the organization would collapse under the weight of paper, but more for the reasons advanced above: talking "off the record" is an essential technique for doing what the organization must do, which is build consensus. It is clear that no decisions are taken at these meetings. And if no decision is taken, nobody can have been coerced into accepting it. That said, if the key opposing players in a particular domain reache an agreement on the central points in contention, as arguably was the case with the FIPs process in July 2004, then other Members will face intense pressure if they resist the consensus—but that is a generic problem in multilateral negotiations, not something specific to small group meetings in the WTO.

A different critique might ask if mini-ministerials meet the criteria Sergio Marchi advanced in 2002 (WTO, 2002a) to ensure that small group consultations "contribute to the achievement of a durable consensus…." All Members know that a mini-ministerial will take place, but not officially, since Members do not wish to recognize them as a normal part of the WTO architecture. Officials do not even name the meetings—they merely refer when necessary to "recent meetings". It follows that Members with an interest in the specific issue under consideration cannot be given the opportunity to make their views known; and that the results are not formally communicated to the full membership—one delegate said that you cannot stand up and announce the "results" of a meeting that officially did not happen, that took no decisions, and that was not meant to have results. The Singapore ambassador made the attempt after one mini-ministerial, I was told, and was pilloried for trying to "formalize" an informal WTO event. The obvious difficulty is that there will always be some "reinterpretation" after the meeting, and nobody can be held to anything they said when even the participants do not necessarily have a shared understanding of the "results" of a meeting with no record. The Marchi guidelines to the contrary, there is an implicit assumption that some Members represent others, without their explicit agreement. Inevitably, then, instead of systematic debriefing of Africans by Africans and so on, which would be desirable, sophisticated diplomats not present at a meeting will call around to colleagues for information on "what happened", but others will be frustrated by feeling left outside.

Turning from legitimacy to effectiveness, who decides to hold mini-ministerial meetings, and are some moments more useful than others? Critics think that the Director-General or the US decides when to hold a meeting, but delegates told me that the decision emerges from conversation in Geneva, although Mike Moore when he was Director-General occasionally encouraged ambassadors to think about whether a meeting would be useful. A Member considering holding a meeting will try out the idea on others, and is obviously more likely to meet with success if the big countries want a meeting. The result is sometimes a dynamic in which a mini-ministerial will be called, whether or not it is needed, though it is not helpful to have a meeting looking for an agenda rather than a problem looking for a solution.

The consensus view is that the two mini-ministerials before Doha contributed to the success of that meeting, and so mini-ministerials became popular, but the ones before Cancún did not work as well, or were tried too early, and so only one was held in the year after Cancún. Mini-ministerials seem to be more useful at some times than others, and the apparent need for the meeting influences what should be on the agenda. Some meetings, like the February 2003 senior officials meeting, are intended to energize the negotiations as a whole; others, like the Montreal meeting in July 2003 focus on particular sticking points. Ministerial engagement is said to be useful when the situation is still flexible and positions are not hard—yet on other occasions a crisis creates opportunity. There is no scientific answer let alone a settled diplomatic consensus on this question. Nobody can say whether the proliferating ministerials made the achievement of the framework package in July 2004 easier or harder. Whenever they are held, most delegates think that their purpose should not be to provide broad direction. Ministers should have a small number of issues before them that politicians have to solve. No ministerial can succeed if ministers have a dozen things to decide—two or three tough items are enough. Ministers are less in control of detail, and do not have much time, so they cannot substitute for ambassadors in Geneva, but they can give guidance—and, if they get on well together, it can defuse conflicts among their officials in Geneva.

Two issues loom large in all assessments of mini-ministerials. The first is TRIPs and access to essential medicines, the focus of the Sydney mini-ministerial in November 2002. In one view of that meeting, Geneva negotiators received conflicting reports from Sydney that ministers had agreed to something, but they did not know what, so their talks stalled. What ministers eventually gave us, a delegate said, was not very useful for the negotiations, and it created confusion and hesitation. The other view of the Sydney meeting's role notes that the Mexican ambassador as chair of the TRIPs negotiating group had been present. He understood more about Members' positions as a result, which helped him to produce a draft. He felt he had a green light from ministers, which gave him the authority to insist on compromises from north and south.

The second issue is agriculture, the central sticking point in the round. The Montreal mini-ministerial is said to have served the purpose of bringing ministers together approximately six weeks prior to Cancún to inject political impetus to the preparatory process, notably on agriculture modalities. Ministers understood that agriculture was the key to Cancún, so they asked the EU and the US to produce a paper on market access. That seemed a helpful idea at the time, but their eventual proposal for a blended formula approach may have come too late for many developing countries to understand it—and some analysts thought that, in accommodating each other, the EU and the US ignored the needs of others, thereby providing the catalyst for the creation of the G-20, and the collapse of Cancún. In Paris in May 2004, ministers again understood that agriculture was the key sticking point, and they put the onus on the G-20: if market access is the heart of the matter, what do you propose? The G-

20 did eventually produce a paper, but all it contained was principles, with no indication of how they proposed even to bridge their internal divisions on market access let alone find a compromise with all the other participants. Delegates conclude that Paris provided positive energy to the negotiations, but no substantive breakthrough. Negotiations do need positive energy of course, yet, one delegate said, you had all the ministers who matter to world trade there in Paris, and they did not deliver. Ministers gave political direction to be "flexible" but they gave no hints on how to do it. Still, without this political pressure, would the G-20 have moved at all? On the other hand, as one delegate asked would the EU have moved at all, since the agriculture and trade commissioners have shown much more flexibility than EU officials, who have been rigid.

The answer to my first question at the start of this assessment section is that ministers have to be involved. Ministers must defend tough decisions at home, and they contribute to making tough decisions in Geneva. Their ability to contribute, however, requires learning about the issues, and the positions of trading partners, which can best be done in informal meetings with colleagues from their own and other regions.

Is informality a good thing? Martin says yes; critics no. But since informality is rife, the real issue is transparency and inclusion, not more rigid rules. With respect to preparing for a minister's participation in WTO Ministerial Conferences, it can be helpful to caucus with like-minded colleagues either regionally or sectorally, but it can also be helpful to participate in such meetings as a means of providing direction to negotiators in Geneva. Such political direction, of course, is best preceded by detailed work among officials, as is the case when sherpas prepare for meetings of the G-8 Summit, or vice-ministers prepare meetings of the G-20 Finance Ministers. The answer to my second question, it follows, is that informal ministerial meetings can be valuable.

The group system is one way to coordinate the views of large numbers of Members, but as sticking points emerge in the WTO, it can be helpful to have cross-regional meetings—that is, meetings of ministers who are "like-minded" only with respect to the need to find a compromise. The answer to my third question, therefore, is that if Members will not agree to set up some sort of successor to CG-18, and there is no chance that they will, then something like the mini-ministerials will continue to be needed. Such meetings work when ministers are asked to give political guidance on a small number of tough issues. Some mini-ministerials, however, may actually have been harmful, because the meeting did not serve a purpose, or slowed the Geneva process as negotiators waited for the "results", or because there was no clarity on what anybody understood to have happened.

Conclusion

Politicians are clearly engaged in the trade regime, but does the nature of this engagement make a difference? Do ministers help or hinder the WTO in the search for consensus in an organization with nearly 150 formally equal Members? Do ministers need to meet more or less frequently, informally or on the record, and in larger or smaller groups?

Some say having a biennial Ministerial Conference was a mistake. That position is not sustainable when issues go behind the border and when ministers even in developing countries can come under intense pressure from their public over WTO issues.[18] The general demands for, and practices of, public participation in leading countries, north and south, now make it impossible to restrict negotiations to a professional core. Ministers are intermediaries between the domestic public and international organizations; they are central to how citizens understand what an international organization does, and how more than just the technocratic concerns of officials can be brought to bear (Keohane and Nye, 2001). Now ministers have to be involved formally, so they have to be involved informally, in consultations, in learning.

Informal political engagement does help the negotiations—to a point. After the April meeting of the TNC, the first held since July 2003, the Director-General reported to the General Council that "The political impetus given to the Round in recent weeks has been absolutely vital." And yet at the June 2004 TNC meeting mentioned in the introduction, where the Director-General reported on the strong political commitment apparent from all his consultation with ministers, he stressed that only the negotiators could bridge the remaining gaps. "Let me be frank here," he said. "The political guidance and direction which we need to be able to move ahead is there. The onus is now fairly and squarely on negotiators in Geneva to do the deals that our political leaders clearly want us to achieve (WTO, 2004b)." He was implicitly suggesting that further ministerial meetings might not be either necessary or helpful. In the event, I think he might have been wrong. Intensive ministerial engagement appears to have been essential to the process of developing and then gaining acceptance for the July 2004 framework, although one should be leery of drawing lessons because similar exceptional circumstances may not arise again.

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[18] One delegate told me about the pressures a developing country minister faced at home in the summer of 2003 when civil society was getting faster reports from Geneva than the minister about the progress of negotiations on access to essential medicines. The absence of effective machinery to keep people informed, and to interpret what was going on, limited that country's ability to be an effective participant.

Another reason for being leery of lessons in recent events is that one explanation for the proliferation of mini-ministerials and micro-ministerials is the personal preference of certain leading ministers. Brazilian Foreign Minister Celso Amorim is a former WTO ambassador. EU trade commissioner Pascal Lamy and US Trade Representative Robert Zoellick had also been senior officials, which is perhaps why Lamy and Zoellick act more like chief negotiators than ministers. Pure politicians, it is said, would let officials do the work—former US Trade Representatives Robert Strauss (who concluded the Tokyo Round) and Mickey Kantor (who concluded the Uruguay Round) did not want to be so actively involved. But Lamy and Zoellick want to be engaged, and they like small informal meetings of their peers. The first problem with the Lamy and Zoellick role is that most of their ministerial peers do not have the same background and so do not bring the same things to the table. One delegate told me that when Zoellick talked about "water" in the tariff at one mini-ministerial, he confused many ministers. ("Water" here refers to the difference between bound and applied tariff rates.)

The second problem is that the active engagement of ministers may be limiting the ability of capital-based senior officials to negotiate. For example, after the Montreal breakdown, it was senior officials who finished the texts in Geneva in April 1989. In the Uruguay Round, the US had a chief negotiator and a deputy, as did many other countries. Some officials believe that negotiations might be easier with that old network of senior officials who had a substantive grasp of detail and of political context, who were able to learn what will work, who could figure out how to narrow the gaps. Now the Americans and the Europeans have no real chief negotiator because the ministers want to make the deals. For the same reason, their ambassadors in Geneva have little authority, unlike many developing country ambassadors who are their respective country's *de facto* chief negotiator. There is considerable misplaced pique in the claim of disgruntled developing country ambassadors that they should not be prevented from speaking at ministerial meetings—but they are often the ones who are the real counterparts, at a technical level, of the EU and US ministers. Or some of them are—a large number of developing country ambassadors have little capacity or authority, and lack well-developed coordination and consultation mechanisms at home, which weakens the ability of Geneva negotiators to make deals, and creates the need for ministers to engage.

The Doha Round of WTO negotiations has been marked from the first by increased developing country engagement because they were unhappy with their half of the Uruguay Round bargain. Developing countries were more active participants at all stages of the latter Round than they had been in the Tokyo Round, but participation was structured by coalitions. The result was an intricate series of cross-sectoral and cross-regional tradeoffs that everyone had to accept as a package. Now that the trading system operates on the basis of the Single Undertaking, it is apparent that without substantial engagement, ministers will not understand the need for and the substance of the tradeoffs that only they can make. It is also now a part of the new reality that the EU and the US are no more able to dominate the WTO than they are able to dominate the global economy. They are essential players, but they cannot set the rules alone. They must involve other large economic powers, now including China, India, and Brazil as well as Japan. The large economies must also involve smaller players because structural change in the global economy and the evolution of the trading system has shifted attention to rules and domestic regulation as the focus of negotiations. These changes in regime tasks have institutional design implications. The need for a wider and more complex consensus involving more domestic actors is part of the explanation for the rise of informal political engagement. Civil society will hold ministers accountable at home, even in developing countries, so ministers must understand the compromises struck in Geneva. Mini-ministerials may not be a good idea, but no-one has a better idea. In the absence of an alternative way to develop consensus, such informal small group meetings will continue.

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APPENDIX

Tables 1-3 set out summary information on formal and informal meetings of WTO members since the formation of the organization. The information has been compiled from public sources, usually the *Bridges* newsletter or *Inside U.S. Trade*. On occasion, the information comes from the host government's website, or from a document circulated to WTO Members. In Table 1, place names in bold designate meetings counted in the list of informal ministerials or mini-ministerials.

Table 1 Formal and informal meetings of WTO Members

Participants	**Results**
1995.11.23-24 at **Vancouver: Informal ministerial meeting** convened by Canadian Trade Minister Roy MacLaren	
"Select middle-size economies" with an interest in trade liberalization: Australia, Hong Kong, Hungary, Indonesia, Morocco, New Zealand, Norway, Singapore, South Africa and Thailand and senior representatives from Argentina, Brazil, Chile, Mexico and Switzerland	Clash over inclusion of trade and labour standards on the agenda for the 1st WTO ministerial in Singapore. Group said economic and political trends point to need to begin discussion of such new topics as trade and competition, investment and the potential impact of regulatory reform programs on trade. Did not formally endorse Quad idea of a working group on regionalism
1996.12.9-13 at SINGAPORE: 1st MINISTERIAL CONFERENCE	
All Members and observers	Consolidates built-in agenda left over from the Uruguay Round
1998.05.18-20 at GENEVA: 2nd MINISTERIAL CONFERENCE	
All Members and observers	Fiftieth anniversary of the GATT Began to structure the built-in agenda into the basis for a ninth round of negotiations.
1998.11. 28 at **Hong Kong: Informal ministerial meeting**	
Hong Kong (China), Argentina, Australia, Chile, Czech Republic, Hungary, Mexico, Morocco, New Zealand, Singapore, Korea, Switzerland, Thailand and Uruguay	Focused on the scope of a proposed new round of global trade talks. Stressed need for US leadership for a broad-based round. Hong Kong (China) pushed for the rapid WTO accession of China.

Participants	**Results**
1999.5. 11-12 at Tokyo: 33rd Quadrilateral Trade Ministers Meeting	
Canada, the European Union, Japan and the United States	Last meeting of Quad Trade Ministers discussed preparations for Seattle but deferred agriculture to the Quint meeting. Also discussed use of ministerials, as at Budapest (below)
1999.05.28 at **Budapest: Budapest Ministerial Conference: "Friends of the New Round"**	
Argentina, Australia, Brazil, Canada, Chile, Costa Rica, the Czech Republic, the European Union, Hong Kong (China), Hungary, India, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, Thailand, the United States and Uruguay	Discussed how Seattle preparatory process could be more efficient: how to create a balanced agenda to respond to the range of interests of all Members. In addition to mandated negotiations on agriculture and services, industrial tariffs should be covered. Some Ministers argued for the inclusion of investment, competition policy and trade facilitation in negotiations. Ministers discussed how political level meetings (APEC, ASEM and G7/G8) could best be used to induce public support for the WTO and the new round. Ministerial meeting of the "Friends of a New Round" in October could contribute to preparation for Seattle; Switzerland offered to host.
1999.10.25-26 at Lausanne, Switzerland: **Ministerial group informally known as the "Friends of the New Round"**	
Ministers and senior officials from: Argentina, Australia, Brazil, Canada, Chile, Hong Kong (China), Hungary, Indonesia, Mexico, Morocco, New Zealand, Norway, Singapore, South Africa, Switzerland, Thailand (NB: no EU, Japan or US; Canada represented by senior official)	Sought to identify issues on which consensus could be reached in Seattle but struggled to find a consensus on a wide range of key issues, particularly agriculture.
1999.11.30-12.03 at SEATTLE, US: 3rd MINISTERIAL CONFERENCE	
All Members and observers	Failed to launch the new round, foundering on the concerns of developing countries that new negotiations were not possible until the Uruguay Round agreements had been implemented.

Participants	Results
2001.1.24 at **Frankfurt**, Germany: **informal meeting of officials** at the vice ministerial level	
Japan, South Africa, Egypt, Brazil, Australia, Hong Kong (China), Korea, Thailand and Switzerland, and the WTO Secretariat	Discussed (a) built-in agenda on agriculture and services as integral part of the new round; (b) non-agricultural products; (c) revision, clarification or improvement of existing WTO rules, including improving and strengthening rules on anti-dumping; (d) Singapore issues, including possibility of a plurilateral approach; (e) other issues such as environment and electronic commerce. Agreement that relationship between trade and labor should be examined outside the WTO negotiations. Consensus that informal process and consultations on major negotiating issues should be encouraged, with maximum transparency vis-à-vis all WTO members.
2001.07.22-24 at Zanzibar, Tanzania: LDC Trade Ministers' Meeting	
Ministers responsible for trade of the Least Developed Countries (LDCs).	Met with a view to adopting a common position on the LDC agenda prior to the 4th WTO Ministerial Conference in Doha. Decided to institutionalize the LDC Trade Ministers' Meeting to take place at least once every two years to precede the WTO Ministerial Conference.
2001.08. 17-18 at Santiago, Chile: Group of Rio 15th Presidential Summit	
Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.	Paragraphs 19 and 20 of the Declaration set out the Rio Group's vision of trade, the WTO and the holding of the forthcoming Ministerial Conference in Doha.
2001.08.23 at New Delhi: Commerce Ministers of the South Asian Association for Regional Co-operation (SAARC)	
Bangladesh, Bhutan, India, Maldive Islands, Nepal, Pakistan and Sri Lanka.	Joint Statement on forthcoming 4th WTO Ministerial in Doha, Qatar, continuing practice prior to Geneva & Seattle Ministerials.

Participants	Results
2001.08.31 - 09.01 at **Mexico City: Informal ministerial**	
Argentina, Australia, Brazil, Canada, European Union, Egypt, Hong Kong (China), India, Jamaica, Japan, Pakistan, Singapore, South Africa, Switzerland, Tanzania, United States and Uruguay. Malaysia represented by its WTO Ambassador as Minister not available. Qatar invited but could not attend.	Assessments mixed. Some progress on environment. India reaffirmed its position that "no new issues should be included in the negotiating agenda of the WTO, unless there is an explicit consensus on the subject, and that implementation concerns of the developing countries arising out of the non-fulfilment of the promises made in the Uruguay Round by the developed countries are addressed up front, before the Fourth Ministerial in Doha."
2001.09.22-23 Abuja, Nigeria: OAU/AEC Ministers of Trade: Committee on Trade, Customs and Immigration	
Ministers of Trade of the Member States of the Organisation of African Unity/African Economic Community.	Considered development issues important to Africa, including coordination of positions at the 4th WTO Ministerial Meeting in Doha
2001.10.13-14 **at Singapore: Informal meeting of ministers**	
Australia, Brazil, Canada, Colombia, Egypt, European Union, Gabon, Hong Kong (China), India, Indonesia, Jamaica, Japan, Korea, Malaysia, Mexico, Pakistan, Qatar, Singapore, South Africa, Switzerland, Tanzania and the US.	On trade and environment, US proposed ministers only discuss relevant issues; Members to decide by consensus at next ministerial whether to negotiate. More than a work program but not quite a negotiation. US Trade Representative Zoellick emphasized importance of the environmental issue; EU Trade Commissioner Lamy explained how difficult it would be for US to commit to negotiate antidumping given opposition in Congress. Singapore issues discussed. On agriculture, Lamy stressed need to balance trade and nontrade concerns, objected to draft language on phase-out of export subsidies. Meeting did not advance key development issues, such as TRIPs/health or implementation of existing agreements.
2001.11.09-14 at DOHA, QATAR: 4th MINISTERIAL CONFERENCE	
All Members and observers	Launches the Doha Development Agenda

Participants	Results
2002.05.15-16 at **Paris**: **Informal Briefing** by WTO DG on margins of OECD Ministerial	
OECD members plus Colombia, Egypt, India, Kenya, Nigeria, Senegal, South Africa, Uganda, People's Republic of China, Hong Kong (China), Indonesia, Russia, Singapore	(1) Moore called meeting to "get countries' ministers engaged early on in the round". (2) Controversy over whether this meeting was to be considered a mini-ministerial or a briefing. (3) Discussed how many informal ministerials should be held before Cancún (2 or 3? On margins of regional meetings?). (4) Pre-Doha differences remain; lack of consensus obvious.
2002.06. 14 at Rome (hosted by Japan): Ministerial Meeting on non-trade concerns	
Albania, Angola, Armenia, Bahrain, Bangladesh, Barbados, Benin, Botswana, Bulgaria, Burundi, Côte d'Ivoire, Cyprus, Czech Republic, Democratic Republic of Congo, Estonia, Ethiopia, European Community, Fiji, Gabon, Ghana, Guinea, Guyana, Hungary, Iceland, Israel, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Madagascar, Malta, Mauritania, Mauritius, Mongolia, Mozambique, Namibia, Norway, People's Republic of China, Poland, Russia, Rwanda, Saint Lucia, Senegal, Chinese Taipei, Slovak Republic, Slovenia, Suriname, Switzerland, Tanzania, Tunisia, Turkey, Yugoslavia	Main conclusions were: Doha Declaration provides that non-trade concerns be addressed in the WTO negotiations on agriculture. Participants stressed their determination that this commitment will be fully honoured. Every country has a legitimate right to pursue non-trade objectives such as strengthening the socio-economic viability and development of rural areas, food security and environmental protection. These objectives cannot be achieved by market forces alone. In the modalities for further commitments that will be established next March in the WTO Agricultural Negotiations, non-trade concerns of both developing and developed countries are elements of vital importance to be duly taken into account in order to establish an agricultural trading system which is fair as well as market oriented. Each country must therefore be able to accommodate such concerns through a variety of instruments
2002.07.17 at **Geneva** (hosted by US) : **Informal meeting of senior officials**	
25 countries, including US, EU, Canada, Japan, Korea, Mexico, Switzerland, India, China, Hungary, Brazil, Hong Kong (China), Kenya and Nigeria	In advance of July 18-19 Trade Negotiations Committee (TNC); likely focus on timeline for agricultural market access negotiations, developing country demands for more benefits under existing trade agreements; and mini-ministerials

Participants	Results
2002.07. 26 at Nara, Japan : Quint informal ministerial	
Agriculture ministers of US, EU, Japan, Canada and Australia	US tables agriculture proposal to be unveiled in Geneva the following week
2002.10.18-21 at Santa Cruz de la Sierra, Bolivia : Cairns Group Ministerial Meeting	
Australia, Canada, Brazil, Argentina, Bolivia, Chile, Costa Rica, Guatemala, Indonesia, Malaysia, Paraguay, Philippines, South Africa, Thailand, Uruguay and special guests from US, Uganda, China, and WTO DG	Discussion of next phase of agriculture negotiations including modalities/negotiating guidelines.
2002.10.23-24 at Los Cabos, Mexico: APEC Ministerial Meeting	
Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong (China), Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, US, Vietnam	Ministers committed to working together in the lead up to Cancún.
2002.11.14-15 at **Sydney**, Australia: **Sydney mini-Ministerial**	
Australia, Brazil, Canada, China, Colombia, Egypt, EU, Hong Kong (China), India, Indonesia, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Nigeria, Senegal, Singapore, South Africa, Switzerland, Thailand, Trinidad and Tobago, US	(1) TRIPs/health dominated discussion; most agreed that TRIPs Council Chair's paper is a "good basis to finalize an agreement" (DFAIT). (2) Developing countries signalled willingness to accept concessions on development issues, and support was expressed for a monitoring mechanism in the Committee on Trade and Development. (3) Little was achieved on market access. (4) Other issues discussed include geographical indications, rules and the Singapore issues.

Participants	**Results**
2003.02.05-06 at **Geneva** (co-hosts Canada and Costa Rica): **Capital-based senior officials meeting**	
Australia, Brazil, Canada, Chile, Costa Rica, EU, Egypt, Hong Kong (China), India, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Singapore, South Africa, Switzerland, Trinidad and Tobago, US, Uruguay, Zambia	Discussed agriculture, NAMA, TRTA and services. Discussion of dispute settlement reform squeezed out by extended debate on agriculture plus recap of progress on NAMA and services negotiations and discussion of usefulness of meetings of select senior officials and trade ministers. Some said Members better served if Ministerials focus on political level decisions. That meant that senior officials should be available at short notice, some officials said.
2003.02.14-16 at Tokyo: **Tokyo mini-Ministerial**	
Australia, Brazil, Canada, Chile, Costa Rica, EU, Egypt, Hong Kong (China), India, Indonesia, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Nigeria, Senegal, Singapore, Switzerland, US, Uruguay; plus agriculture ministers from EC, Japan, Korea, Brazil, India, Switzerland, Canada, WTO DG Supachai and General Council Chair del Castillo.	(1) Japan presented a Feb. 5 statement of the "friends of antidumping group". (2) Canada led the discussion on the Singapore issues. (3) Discussions dominated by agriculture; focus on Harbinson modalities text—US and Cairns Group supported more ambition; EC and Japan more balance. (4) Kenya, Nigeria, Lesotho and Senegal indicated that TRIPs/health was their key issue. (5) Little progress on market access, which US claimed was their main motive for the Round.
2003.04.28-29 at Paris **Host: New Zealand: Informal Dinner** on margins of OECD ministerial	
OECD members plus Brazil, Chile, China, Egypt, India, Indonesia, Morocco, Singapore, South Africa	US Trade Representative Zoellick wanted to use the OECD ministerial to "ensure that the Cancún ministerial will be a success"
2003.05.27 at Copenhagen, Denmark: Making Trade Work for the Poor	
Ministers plus IMF, World Bank & WTO, including DG Supachai Panitchpakdi	(1) Held in "anticipation of the fifth WTO Ministerial in Cancún" (Bridges). (2) Focused on the relationship between trade and development

Participants	**Results**
2003.05.28-29 at Nairobi, Kenya: Common Market for Eastern and Southern Africa (COMESA) Ministerial	
Ministers of Trade from Eastern and Southern Africa: Angola, Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe	(1) Meeting sought agreement on common strategy for Cancún. (2) Deep concern expressed over limited progress on Doha Round. (3) Discussed agriculture, S&D, NAMA, implementation, TRIPs and health. (4) Result: "Nairobi Declaration on Preparation for EPA negotiations and the 5th WTO Ministerial Conference" (WT/L/519)
2003.05.31-06.02 at Dhaka, Bangladesh: LDC Meeting of Trade Ministers	
49 LDCs	Adopted Dhaka Declaration (WT/L/521) which formed common stance for Cancún focusing on: (1) unrestricted market access; (2) freer labour movement; (3) end agricultural subsidies and restrictions on food imports; (4) expansion of special and differential treatment
2003.06. 01-03 at Evian, France: Annual G-8 Summit	
G-8 countries plus representatives from Algeria, Brazil, China, Egypt, India, Malaysia, Mexico, Saudi Arabia, Senegal, South Africa, UN, World Bank, IMF, WTO	Pledged commitment to ensure that Cancún would take all decisions necessary to ensure that goals set out in Doha agenda will be reached on time.
2003.06.02-03 at Khon Kaen, Thailand: Meeting of APEC Ministers Responsible for Trade	
Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong (China), Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, US, Vietnam	Cancún meeting was one of the major issues on the agenda; ministers stressed "the need for a successful Cancún ministerial".
2003.06.06-07 at Lusaka, Zambia: Special Meeting of Ministers of Trade & Industry of Southern Africa Development Community (SADC)	
Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zimbabwe, Zambia	Participants expressed concern on limited progress made in the Doha Round. Issues addressed include TRIPs and health, S&D, non-agricultural market access, agriculture and services.

Participants	Results
2003.06. 19-20 at Grand Baie, Mauritius: African Union Trade Ministers Meeting	
40 countries	Objective to find a common position for Cancún. Ministers adopted Declaration (WT/L/522) that, *inter alia*: (1) expressed "serious concerns at the general lack of progress in the current round of multilateral trade negotiations"; (2) claimed agriculture is of critical importance; (3) suggested that Members should be able to regulate trade in services based on national policy objectives; (4) suggested WTO should focus on development concerns such as agriculture, elimination of cotton subsidies, intellectual property, S&D, implementation, industrial products rather than Singapore issues; (5) criticized lack of transparency and inclusiveness at WTO. Conclusions later endorsed in "Maputo Declaration on the Fifth Ministerial Conference of the WTO" adopted by Heads of State and Government of African Union, Maputo, Mozambique.
2003.06.20-21 at **Sharm el-Sheikh**, Egypt: **Egypt mini-Ministerial**	
Australia, Bangladesh, Brazil, Canada, Chile, China, Costa Rica, Egypt, Hong Kong (China), India, Indonesia, Japan, Jordan, Kenya, Korea, Lesotho, Malaysia, Mexico, Morocco, Mauritius, New Zealand, Nigeria, Senegal, Singapore, South Africa, Switzerland, Thailand, US, EU	(1) Agriculture discussed, but no progress. (2) Little progress was made on TRIPs and health. (3) Progress made on S&D. (4) India stated opposition to Singapore issues being on agenda, while Costa Rica, Japan and Switzerland promoted their importance. (5) Little progress made on NAMA. (6) On services, many stressed need to focus on Mode 4.
2003.07.02-05 at Montego Bay, Jamaica: 24th Meeting of Conference of Heads of Government of the CARICOM, Ministers	
Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, Suriname, St. Vincent and the Grenadines, Trinidad and Tobago, US and WTO DG	Raised concern over need for S&D provisions in WTO. Other priorities for this group include agriculture, implementation issues and access to low cost medicines. Document issued 2003.08.06 in the name of the ministers of these countries: *The Caribbean Declaration on the 5th Ministerial Conference of the WTO* (WT/MIN(03/6).

Participants	Results
2003.07. 05-07 at London, UK: Commonwealth Trade Forum and Lunch for Commonwealth Ministers at Lancaster House	
UK, Tanzania, Kenya, Sri Lanka, Malawi, Bangladesh, Fiji, Namibia, Papua New Guinea.	Much discussion of Singapore issues, especially investment, with divided views on merits. Many developing countries stressed importance of agriculture.
2003.07.06-07 at Palermo, Italy: 3rd EuroMed Trade Ministerial and Informal EU Trade Ministerial	
EU plus Israel, Morocco, Algeria, Tunisia, Egypt, Jordan, Lebanon, Syria, Turkey, Palestinian Authority, Malta and Cyprus	Ministers exchanged views on preparations for Cancún: (1) Discussed agriculture and need to get US, Canada, Australia to make concessions in response to CAP reform. (3) Discussed services and developing country access to medicines. (4) NGOs delivered statement on opposition to inclusion of Singapore issues in Cancún agenda.
2003.07.24-25 at Beirut, Lebanon : United Nations-backed Arab Ministerial Meeting	
Ministers from Qatar, Syria, Egypt, United Arab Emirates, Jordan, Yemen, Algeria, Sudan, and Lebanon plus representatives from many international organizations including: League of Arab States (LAS), WIPO, UNCTAD, WTO. Ministers from Bahrain, Kuwait, Syria, Saudi Arabia and Oman also participated.	(1) Goal was to form a common position for Cancún and discuss WTO issues of concern to the region. (2) Agreed to "take a slow-down on Singapore issues" (ECSWA). (3) Agreed that agriculture, services and pharmaceutical agreements are very important to the region. (4) Discussed trade, debt and finance linkages as well as technology transfer. (WT/L/537)
2003.07. 28-30 at **Montreal Canada : Informal Ministerial Meeting in Montreal**	
Canada, Argentina, Australia, Bangladesh, Brazil, Chile, China, Colombia, Costa Rica, EU, Guyana, Hong Kong (China), India, Japan, Kenya, Korea, Lesotho, Mexico, Morocco, New Zealand, Pakistan, Singapore, South Africa, Switzerland, US. Attended by trade ministers, some agriculture ministers, senior officials, WTO DG and WTO General Council Chair.	(1) Extensive discussion of agriculture. (2) Discussions on NAMA focused on the level of ambition and the need for flexibility. (3) The discussions on development seemed not to go far.

Participants	Results
2003.07.31– 08.01 at Brussels Belgium: African, Caribbean and Pacific (ACP) Meeting	
States from Africa, Caribbean and Pacific	(1) Opposition to Singapore issues. (2) "The ACP trade ministers also took the calls for transparency and democracy in the WTO contained in the Dhaka and Mauritius declarations one step further". (3) Reiterated need to improve agricultural market access. (4) Also discussed: S&D, implementation, NAMA, TRIPs/health.
2003.08.28-30 Nairobi, Kenya : Global Coalition for Africa	
Burkina Faso, Cameroon, Congo-Brazzaville, Ethiopia, Gabon, Ghana, Kenya, Mali, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Tanzania, Uganda. Attended by trade ministers, Parliamentarians, NGOs	(1) Focused on agriculture and particularly on need for agreement on cotton and sugar in Cancún. (2) Agreed to form a single negotiating team and have a united position. (3) Discussed TRIPs.
2003.09.03-04 at Georgetown, Guyana: The Council for Trade and Economic Development (COTED), the Heads of Government of the Caribbean Community (CARICOM)	
Ministers and Senior Officials of CARICOM member countries; Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago	Confirming their issues for Cancun ministerial meeting in accordance with the document issued in the name of the ministers of these countries: Caribbean Declaration on the 5th Ministerial Conference of the WTO (WT/MIN(03)/6)
2003.09.10-14 at CANCÚN MEXICO: 5th MINISTERIAL CONFERENCE	
All Members and observers of the WTO	Fails to advance the Doha Development Agenda
2003.10.10 Buenos Aires : ministers	
Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Mexico, Paraguay, South Africa, Venezuela	Examined perspectives on trade negotiations after Cancún; pre General Council meeting slated for Geneva by 15 December 2003.

Participants	**Results**
2003.10.17-18 at Bangkok, Thailand: 15th APEC Ministerial Meeting	
APEC members and Secretariat; ASEAN Secretariat. Pacific Economic Cooperation Council and Pacific Islands Forum attended as observers	Supported WTO General Council Chair leading talks at the General Council on key issues (agriculture, NAMA, Singapore issues) to set work programs for negotiations no later than 15 December 2003.
2003.11.13-14 at Cairo, Egypt: Informal African ministerial meeting	
Benin, Botswana, Burkina Faso, Chad, Kenya, Lesotho, Mali, Mauritius, Nigeria, Senegal, South Africa and Egypt: plus WTO DG and Trade Commissioner of the Economic and Monetary Union for West Africa	Supachai notes that meeting expressed its support for efforts to ensure that negotiations regain momentum.
2003.11.27-28 at Brussels : ACP (African, Caribbean and Pacific) Council of Ministers 78th session	
79 ACP countries	Discussed post-Cancún WTO positions, EU-ACP Cotonou Agreement and agriculture. Encouraged G-90 co-ordination as at Cancún.
2003.12.11-12 at Brasilia : G-20 group ministerial	
G-20 member states, EU (Lamy), WTO DG	"Urgent" meeting in advance of the December 15 deadline in Geneva
2004.01.21-25 at Davos, Switzerland : "meeting on the sidelines" at the World Economic Forum	
Representatives from 20 countries, including ministers from Brazil, India, Canada, Switzerland and others.	Issues discussed included cross-border investment, competition, high tariffs on exports, and farm subsidies.
2004.01.30-31 at Tagaytay, Philippines : Forum for East Asia-Latin America Cooperation (FEALAC)	
Australia, Brunei, Cambodia, China, Indonesia, Japan, Korea, Laos, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand, Vietnam, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rice, Cuba, Ecuador, El Salvador, Mexico, Panama, Paraguay, Peru, Uruguay, Venezuela, Guatemala, Nicaragua	(1) Agreed on necessity for agricultural reform and improved market access for goods and services. (2) Agreed that improvement of inter-regional dialogue needed. (3) Need to ensure that the results of the Doha Round contribute to fairer and more equitable trading system. Attended by Foreign Ministers and "Senior Officials"

Participants	**Results**
2004.02.18-19 at Mombasa, Kenya : Informal meeting	
Kenya, Uganda, Tanzania, Mali, South Africa, Senegal, Egypt, Benin, Ghana, Morocco, Benin, Nigeria, DR Congo, Rwanda, Botswana, Zambia, Malawi, Mauritius, US, EU	Hosted by Kenya in an effort to bridge differences after the collapse of world trade negotiations in Cancún.
2004.02.23-25 at Costa Rica : Cairns Group Meeting Agriculture Ministers	
Australia, Canada, New Zealand, South Africa, Argentina, Bolivia, Brazil, Chile, Indonesia, Paraguay, Philippines. Guests: USTR Zoellick, Mexico FM Derbez, WTO DG Supachai and Ambassador Groser, Chair of the WTO Committee on Agriculture Special Sessions	(1) Decided to collaborate more closely and draft a new negotiating position. (2) Agreed to continue pushing for cuts in domestic and export subsidies, but that developing countries should receive special treatment.
2004.03.04-05 at New Delhi: India-Brazil-South Africa Trilateral Ministerial Forum	
Brazil, India, South Africa Foreign Ministers	Agreed to jointly develop "alternative perspective on world affairs"
2004.05.01 at London, UK : "Micro-Ministerial"	
EC , Kenya, South Africa, Brazil, US Trade/Foreign Ministers	(1) Attempted to develop a package of proposals with broad appeal before U.S. Presidential election in November and change in EU leadership in October closed window of opportunity. (2) Main sticking point to negotiations was agricultural market access, followed by the Singapore issues.
2004.05.04-05 at Dakar, Senegal : Third LDC Trade Ministers Conference	
49 LDC member states. Guests: WTO DG Supachai; EU Trade Commissioner Lamy	(1) Took stock of developments since Cancún. (2) Adopted the Dakar Declaration, calling for the phase-out of export subsidies in developed countries. (3) WTO DG urged greater flexibility on Singapore issues from LDCs if they wished to gain on issues of greater importance to them. (4) Main issues addressed were agriculture, cotton, and NAMA.

Participants	**Results**
2004.05.04-05 at Gaborone Botswana: 79th Session of the ACP Council of Ministers	
All ACP Members	Confirmed G-90 meetings for June and July, 2004; prepared for immediately following 29th Session of ACP-EU Council of Ministers.
2004.05.12-13 at Paris, France : Five Interested Parties	
US, EC, Australia, Brazil, India Trade Ministers	Informal meeting to find common ground at political level on key issues, especially agriculture. Participants, not being "like-minded", referred to as NG-5 (for non-group) or FIPs (five interested parties)
2004.05.13-14 at Paris, France : Mini-ministerial	
All OECD countries, plus ministers from Argentina, Bangladesh, Botswana, Brazil, Chile, China, Guyana, Hong Kong (China), India, Indonesia, Kenya, Russia, Singapore, and South Africa	(1) Agriculture was main focus; all welcomed EC promise to eliminate export subsidies. (2) G-20 and Cairns Group agreed to work together to develop an alternative to EC/US formula on agricultural tariff cuts. (3) EC expressed willingness to separate Singapore issues. (4) EC and US requested G-20 to develop alternative agricultural reduction formula.
2004.05.27-28 at Kigali, Rwanda : African Union-organized conference	
AU member states : Trade, Customs, and Immigration Ministers	(1) "Kigali Consensus" primarily concerned with Singapore issues; all save trade facilitation should be dropped. (2) Agricultural tariff reduction formula should take into account Africa's development concerns. (3) Called for elimination of all cotton subsidies within 3 years.
2004.06.03-04 at Georgetown, Guyana : G-90 Mini-ministerial	
18 member states : Trade ministers and Ministerial Representatives	(1) Decided to further develop working documents on agriculture, cotton, commodities, and treatment of small economies for the G-90 Ministerial in July. (2) Steering Committee established to facilitate cooperation between G-90 member states on WTO issues. (3) Georgetown Consensus draws heavily on Kigali Consensus.

Participants	**Results**
2004.06.04-05 at Pucon, Chile : 10th Meeting of APEC Trade Ministers	
21 APEC member states	(1) Called on WTO Members to meet framework negotiations deadline by the end of July. (2) Urged focus on areas of contention, specifically agriculture, NAMA, and trade facilitation.
2004.06.08-10 at Sea Island, Georgia, USA : G-8 Annual Summit	
Canada, France, Germany, United Kingdom, US, Italy, Japan, and Russia; Guests: Algeria, Ghana, Nigeria, Senegal, South Africa, and Uganda	(1) Reaffirmed commitment to Doha Round and to finish framework negotiations by end-July. (2) Priorities included agricultural market access & subsidies, improved NAMA, better opportunities in services, advance development goals, and encourage South-South trade.
2004.06.11-12 Sao Paulo, Brazil : G-77 Special Ministerial Meeting	
G-77 Group of Developing Nations and China	Called for developed countries to provide assistance to developing countries so that they are able to take full advantage of the multilateral trading system. Demanded that developed countries fulfill the development commitments they made at Doha and called for facilitation of accession to the WTO of developing countries.
2004.06.13 at Sao Paulo, Brazil : Five Interested Parties	
US, EU, Brazil, India, Australia, and Ambassador Groser, Chair of agriculture negotiations	Mostly concerned with agricultural market access and formula for tariff reductions. Discussions included how to implement concept of "parallelism" and "blue box" for domestic support.
2004.07.05 at Geneva : G-10 ministerial of agriculture ministers and senior officials	
Bulgaria, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Norway, Switzerland and Chinese Taipei. Ambassador Groser (New Zealand) as Chair of agriculture negotiations	Communiqué recognised that negotiations on a framework for modalities in agriculture under the Doha Development Agenda were at a genuinely critical juncture. Ministers also reaffirmed their commitment to contribute to a substantial and balanced July Package.

Participants	Results
2004.07.06-08 at Addis Ababa, Ethiopia : African Union Summit 2004	
AU member states: 53	The third Ordinary Session of the African Union Assembly.
2004.07.10-11 at Paris; hosted by Brazil : Five Interested Parties	
US, EU, Brazil, India, Australia, WTO DG, and Ambassador Groser (New Zealand) as Chair of agriculture negotiations	Discussed July Framework proposals.
2004.07.13 at Mauritius : G-90 Trade Ministers	
Alliance of the African, Caribbean and Pacific (ACP) Group of States, the African Union (AU) and the Least Developed Countries (LDCs), commonly known as the G-90	Discussed progress of WTO negotiations and sought elements for agreement for a G-90 Consensus on the Doha Development Agenda. Top trade officials from the US, the EU, Brazil and India urged G-90 to back the drive to agree on a negotiating framework for the Round.
2004.07.21 at Istanbul, Turkey: 4th Euromed Trade Ministerial Conference	
EU plus Israel, Morocco, Algeria, Tunisia, Egypt, Jordan, Lebanon, Syria, Turkey, Palestinian Authority	Focused on Barcelona Process for regional free trade, including GATS-consistent services free trade. Ministers reiterated commitment to successful Doha Round, including on market access and rules.
2004.07.27-29 at Geneva : Five Interested Parties	
US, EU, Brazil, India, Australia, and Ambassador Groser (New Zealand) as Chair of agriculture negotiations	The FIP met in the US delegation to the WTO during the last week of July to try to break the deadlock on the agriculture framework
2004.07.30-31 at Geneva : WTO General Council	
30 ministers from 25 countries (only some of whom were regular participants in mini-ministerials) were in Geneva in the days before and during the meeting of the General Council called to agree on the framework package originally proposed at Cancún.	Ministers were involved in Green Room meetings and at the General Council, but these meetings were not a "mini-ministerial" and the General Council was a regular meeting—many countries, therefore, were represented by senior officials or ambassadors

Table 2: Mini-ministerials between Doha and Cancun

Attendees	Coalitions and RTAs (from table 3)	Chairs (from Table 3)
2002.05.15-16 Paris France : Informal Briefing by WTO DG on margins of OECD ministerial		
OECD members plus Colombia, Egypt, Hong Kong (China), India, Kenya, Nigeria, Senegal, South Africa, Uganda, China, Indonesia, Russia, Singapore	Virtually all RTAs represented; Main Coalitions Cairns = 7; EU = 5; G-20W = 7; AU = 6; ACP = 5	Kenya: Trade Policy Review Body, "Development Issues" Facilitator; Mexico: Council for TRIPs; Singapore "Agricultural Issues" Facilitator
2002.07.17 at Geneva (hosted by US) : Informal meeting of senior officials		
25 countries, including US, EU, Canada, Japan, Korea, Mexico, Switzerland, India, China, Hungary, Brazil, Hong Kong (China), Kenya and Nigeria	Main RTAs: COMESA = 1; EFTA = 1; GSTP = 5; LAIA = 2; PTN = 3; NAFTA = 3; Main Coalitions: Cairns = 2; G-20W = 5; G-10 = 3; AU = 2; ACP = 2	Canada: General Council, "Singapore Issues" Facilitator; Kenya: Trade Policy Review Body, "Development Issues" Facilitator; Mexico: Council for TRIPs; Singapore "Agricultural Issues" Facilitator
2002.11.14-15 : Sydney, Australia : Sydney mini-Ministerial		
Australia, Brazil, Canada, China, Colombia, Egypt, EU, Hong Kong (China), India, Indonesia, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Nigeria, Senegal, Singapore, South Africa, Switzerland, Thailand, Trinidad and Tobago, US	Main RTAs: GSTP = 13; PTN = 5; NAFTA = 3; AFTA = 4; ASEAN = 4 Main Coalitions: Cairns = 9; G-20W = 8 AU = 6; ACP = 6	Canada: General Council, "Singapore Issues" Facilitator; Hong Kong (China): Com. On Agriculture, Special Session, "NAMA Issues" Facilitator; Kenya: Trade Policy Review Body, "Development Issues" Facilitator; Korea: Council for TRIPs, Special Session; Malaysia: Council for Trade in Goods; Mexico: Council for TRIPS; New Zealand: Negotiating Group on Rules; Singapore: "Agriculture Issues" Facilitator; Switzerland: Negotiating Group on Market Access

Attendees	Coalitions and RTAs (from table 3)	Chairs (from Table 3)
2003.02.05-06 Geneva, co-hosts Canada and Costa Rica : Capital-based senior officials meeting		
Australia, Brazil, Canada, Chile, Costa Rica, EU, Egypt, Hong Kong (China), India, Japan, Kenya, Korea, Lesotho, Malaysia, Mexico, New Zealand, Singapore, South Africa, Switzerland, Trinidad and Tobago, US, Uruguay, Zambia	Main RTAs: GSTP = 8 LAIA = 4; PTN = 6 NAFTA = 3 COMESA = 3 Main Coalitions: Cairns = 9 G-20W = 5 AU = 5 ACP = 5	Brazil: WG on Trade and Investment; Canada: "Singapore Issues" Facilitator; Chile: Council for Trade in Services, Special Session; Costa Rica: WG on Transparency in Government Procurement; Hong Kong (China): Com. On Budget, Finance, and Administration, Com. On Agriculture, Special Session, "NAMA issues" Facilitator; Japan: Dispute Settlement Body; Kenya: "Development Issues" Facilitator; Korea: Council for TRIPS, Special Session; New Zealand: Negotiating Group on Rules; Singapore: Council for TRIPS, "Agricultural Issues" Facilitator; Switzerland: NG on Market Access; Uruguay: General Council.
2003.02.14-16 at Tokyo, Japan : Tokyo mini-Ministerial		
Australia, Brazil*, Canada,* Chile, Costa Rica, EU*, Egypt, Hong Kong (China), India*, Indonesia, Japan*, Kenya, Korea*, Lesotho, Malaysia, Mexico, New Zealand, Nigeria, Senegal, Singapore, Switzerland*, US, Uruguay *also agriculture ministers	Main RTAs: GSTP = 7 LAIA = 4 PTN = 6 NAFTA = 3 COMESA = 3 Main Coalitions: Cairns = 8 G-20W = 4	Brazil: WG on Trade and Investment; Canada: "Singapore Issues" Facilitator; Chile: Council for Trade in Services, Special Session; Costa Rica: WG on Transparency in Government Procurement; Hong Kong (China): Com. On Budget, Finance, and Administration, Com. On Agriculture, Special Session, "NAMA issues" Facilitator; Japan: Dispute Settlement Body; Kenya: "Development Issues" Facilitator; Korea: Council for TRIPS, Special Session; New Zealand: Negotiating Group on Rules; Senegal: Council for Trade in Services; Singapore: Council for TRIPS, "Agricultural Issues" Facilitator; Switzerland: NG on Market Access; Uruguay: General Council.

Attendees	**Coalitions and RTAs (from table 3)**	**Chairs (from Table 3)**
2003.04.28-29 Paris, France : Informal Dinner Hosted by New Zealand on the margins of the OECD ministerial		
OECD member countries; participants at the informal meeting included: Brazil, Chile, China, Egypt, India, Indonesia, Morocco, Singapore, South Africa	Main RTAs: EC = 16; EEA = 18 NAFTA = 2;EFTA = 3 Main Coalitions: Cairns = 3; EU = 16 G-10 = 5	Singapore: Council for TRIPS, "Agricultural Issues" Facilitator; Brazil: WG on Trade and Investment; Chile: Council for Trade in Services, Special Session;
2003.06.20-21 Sharm el-Sheikh, Egypt : mini- Ministerial		
Australia, Bangladesh, Brazil, Canada, Chile, China, Costa Rica, Egypt, Hong Kong (China), India, Indonesia, Japan, Jordan, Kenya, Korea, Lesotho, Malaysia, Mexico, Morocco, Mauritius, New Zealand, Nigeria, Senegal, Singapore, South Africa, Switzerland, Thailand, US, EU	Main RTAs: GSTP = 14 PTN = 7 NAFTA = 3 AFTA = 4 ASEAN = 4 Main Coalitions: Cairns = 10 G-20W = 8 AU = 8 ACP = 6	Brazil: WG on Relationship between Trade and Investment; Canada: "Singapore Issues" Facilitator; Chile: Council for Trade in Services, Special Session; Costa Rica: WG on Transparency in Government Procurement; Hong Kong (China): Com. On Budget, Finance, and Administration, Com. On Agriculture, Special Session, "NAMA Issues" Facilitator; Japan: Dispute Settlement Body; Kenya: "Development Issues" Facilitator; Korea: Council for TRIPS, Special Session; Mauritius: Com. On RTAs; New Zealand: Negotiating Group on Rules; Senegal: Council for Trade in Services; Singapore: Council for TRIPS, "Agricultural Issues" Facilitator; Switzerland: Negotiating Group on Market Access

Attendees	Coalitions and RTAs (from table 3)	Chairs (from Table 3)
2003.07.28-30 at Montreal, Canada : Informal Ministerial Meeting in Montreal		
Canada, Argentina, Australia, Bangladesh, Brazil, Chile, China, Colombia, Costa Rica, EU, Guyana, Hong Kong (China), India, Japan, Kenya, Korea, Lesotho, Mexico, Morocco, New Zealand, Pakistan, Singapore, South Africa, Switzerland, US. Trade ministers, some agriculture ministers, senior officials and WTO DG Supachai and WTO General Council Chair Perez Del Castillo	Main RTAs: GSTP = 17 PTN = 8 LAIA = 4 NAFTA = 3 AFTA = 2 ASEAN = 2 Main Coalitions: Cairns = 10 G-20W = 8 AU = 7 ACP = 6	Canada: "Singapore Issues" Facilitator; Brazil: WG on Relationship between Trade and Investment; Chile: Council for Trade in Services, Special Session; Colombia: WG on Trade, Debt, and Finance; Costa Rica: WG on Transparency in Government Procurement; Guyana: "Other Issues" Facilitator; Hong Kong (China): Com. On Budget, Finance, and Administration, Com. On Agriculture, Special Session, "NAMA Issues" Facilitator; Japan: Dispute Settlement Body; Kenya: "Development Issues" Facilitator; Korea: Council for TRIPS, Special Session; New Zealand: Negotiating Group on Rules; Pakistan: Com. On Balance of Payments Restrictions; Singapore: Council for TRIPS, "Agricultural Issues" Switzerland: Negotiating Group on Market Access

Table 3: Country Information

Country[1]	Mtgs[2]	GNI (PPP)	Trade Rank[3]	Dels[4]	RTAs[5]	Coalitions[6]	Chair(s)[7]
Argentina	1	9,930	6	9	GSTP, LAIA, MERCOSUR	Cairns Group, G-20W, G-20F	
Australia	7	26,960	13	9	CER, SPARTECA	Cairns Group, G-20F	
Bangladesh	2	1,720		5	Bangkok Agreement, GSTP, PTN, SAPTA	LDC	2002: Com. On Trade & Development 2003 Coordinator of the LDC Group
Brazil	7	7,250	14	11	GSTP, LAIA, MERCOSUR, PTN	Cairns Group, G-20W, G-20F	2003: WG on Relationship between Trade and Investment
Canada	8	8,070	5	11	NAFTA	Cairns Group, G-8, G-20F	Cancun: "Singapore Issues" 2002: General Council
Chile	5	9,180		5	GSTP, LAIA, PTN	Cairns Group, G-20W	2003 Special Session of the Council for Trade in Services
China	6	4,390	4	13	Bangkok Agreement	G-20W, G-33, G-20F	
Colombia	3	5,870		5	CAN, GSTP, LAIA	Cairns Group,	2003: WG on Trade, Debt, and Finance
Costa Rica	4	8,260		4	CACM, CAFTA	Cairns Group	2003: WG on Government Procurement

Country[1]	Mtgs[2]	GNI (PPP)	Trade Rank[3]	Dels[4]	RTAs[5]	Coalitions[6]	Chair(s)[7]
Egypt	6	,710		7	COMESA, GSTP, PTN, TRIPARTITE	AU, G-20W, LMG	
EU	7	-----		13	EEA	G-8, G-20F	
Guyana	1	3,780		3	CARICOM, GSTP	ACP	Cancun: "Other Issues, i.e. TRIPS registry"
Hong Kong (China)	8	26,810	6	7			2003: Com. on Budget, Finance, & Administration 2003: Com. on Agriculture, Special Session Cancun: NAMA
Hungary	2	12,810		4	CEFTA	EU (accession)	2003 Special Session of DSB
India	8	2,570	17	8	Bangkok Agreement, GSTP, SAPTA, TRIPARTITE	G-20W, G-20F, LMG	
Indonesia	5	2,990	16	6	AFTA, ASEAN, GSTP, LMG	Cairns Group, G-20W, G-20F, G-33	
Japan	8	26,070	3	21		G-10, G-8, G-20F	2003: Dispute Settlement Body
Jordan	1	4,070		2			

Country[1]	Mtgs[2]	GNI (PPP)	Trade Rank[3]	Dels[4]	RTAs[5]	Coalitions[6]	Chair(s)[7]
Kenya	7	990		3	COMESA, EAC	AU, ACP, G-6, G-33, LMG	Cancun: Development Issues 2002: Trade Policy Review Body
Korea	8	16,480	7	19	Bangkok Agreement, GSTP, PTN	G-10, G-33, G-20F	2003 Special Session of the TRIPs Council
Lesotho	5	2,710		4		AU, ACP, LDC	
Malaysia	5	8,280	10	4	AFTA, ASEAN, GSTP	Cairns Group, LMG	2002: Council for Trade in Goods
Mauritius	1	10,530		6	COMESA	AU, ACP, G-10, G-33, LMG	2003: Com. On RTAs Chair AU trade ministers, 2003-2004 (WT/L/522)
Mexico	8	8,540	8	10	GSTP, LAIA, NAFTA, PTN	G-20W, G-20F	2003: Cancun chair 2002: TRIPs Council
Morocco	3	3,690		7	GSTP	AU	
New Zealand	7	20,020		6	CER, SPARTECA	Cairns Group	2003 Negotiating Group on Rules
Nigeria	5	780		7	GSTP	AU, ACP, G-20W, G-33	Until 2003: Chair AU trade ministers? Africa Group coordinator in 2002?
Pakistan	1	1,940		4	ECO, GSTP, PTN, SAPTA	G-20W, G-33, LMG	2003: Com. on Balance of Payments
Senegal	4	1,510		5	UEMOA/ WAEMU	AU, ACP, LDC, G-33	2003: Council for Trade in Services

Country[1]	Mtgs[2]	GNI (PPP)	Trade Rank[3]	Dels[4]	RTAs[5]	Coalitions[6]	Chair(s)[7]
Singapore	7	23,090	9	8	AFTA, ASEAN, GSTP		2003: TRIPs Council Cancun: Agriculture
South Africa	6	,870	23	4		AU, ACP, Cairns Group, G-20W, G-20F	
Switzerland	8	31,250	11	8	EFTA	G-10	2003 Negotiating Group NAMA
Thailand	2	6,680	12	14	AFTA, ASEAN, GSTP	Cairns Group, G-20W?	
Trinidad and Tobago	2	8,680		5	GSTP	ACP, G-33	
Uganda	1	1,320		5	COMESA, EAC	AU, ACP, G-33, LMG	
Uruguay	2	12,010		7	LAIA, MER-COSUR, PTN	Cairns Group	2003: General Council 2002: Dispute Settlement Body
USA	8	35,060	2	16	NAFTA, CAFTA	G-8, G-20F	
Zambia	1	770		7	COMESA	AU, ACP, LDC, G-33	

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[1] Attended at least one WTO-related informal meeting of senior officials or Ministers since the creation of the WTO. List does not include Member states of the EU. Exceptions are Barbados and Iceland, which hold a 2004 chair.

[2] Meetings after Doha/Before Cancun

[3] Rank in top 26 WTO Members as a share of world merchandise exports, 2002. If the cell is blank, the country represents less than 0.5% of world merchandise export. Source: Appendix Table IA.2 Leading exporters in world merchandise trade (excluding intra-EU trade), 2002 (WTO, 2003)

[4] Number of delegates in Geneva, based on the diplomatic list notified to the secretariat. NB the counts may occasionally be high because some delegations appear to notify officials who work mostly or exclusively on non-WTO matters.

[5] Source: WTO list of regional trade agreements

[6] **G-20W** is the new WTO coalition that emerged in Cancun. Membership stabilized slowly; this table is based on the list in the December 2003 communique. Current members Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand, Tanzania, Venezuela, Zimbabwe

G-20F indicates members of the G-20 group of Finance Ministers created in 1999. This table is based on the list of participants at the 2003 meeting in Mexico, which includes non-Members of the WTO: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, México, Russia, Saudi Arabia, South Africa, Korea, Turkey, the United Kingdom, the United States and the European Union.

G-33 The Alliance for Special Products (SPs) and a Special Safeguard Mechanism (SSM), or G-33, was formed shortly before and during the Cancun Ministerial Conference. The current membership has not been listed in G-33 documents circulated in the WTO. Among the countries that have identified themselves as G-33 members are: Barbados, Botswana, Congo, Côte d'Ivoire, Cuba, Dominican Republic, Haiti, Honduras, Indonesia, Jamaica, Kenya, Korea, Republic of, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Senegal, Sri Lanka, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, Zimbabwe

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G-10 Bulgaria, Chinese Taipei, Rep of Korea, Iceland, Israel, Japan, Liechtenstein, Mauritius, Norway and Switzerland.

G-90 (African, Acp And Least-Developed Countries) (currently 63 members of the WTO): Angola, Antigua-Barbuda, Bangladesh, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Cote d'ivoire, Cuba, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, Fiji, Gabon, Ghana, Grenada, Guinea (Conakry), Guinea Bissau, Guyana, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Namibia, Nepal, Niger, Nigeria, Papua New Guinea, Rwanda, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Senegal, Sierra Leone, Solomon Islands, South Africa, Suriname, Swaziland, Tanzania, The Gambia, Togo, Trinidad & Tobago, Tunisia, Uganda, Zambia, Zimbabwe

LMG "Like-Minded Group" Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe

Cairns Group Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, Uruguay

[7] Chairmanships are designated as such: Any year followed by a title indicates that country was (or is) the WTO body chair; any year + "TNC" followed by a title indicates that country was (or is) the Trade Negotiating Committee chair, instituted specially for the Doha Development Agenda; "Cancun" followed by a title indicates that country was the facilitator for that particular group of issues at the Cancun ministerial.

Addressing Systemic Issues in the WTO: Lessons from the Singapore Issues

Erick Duchesne[*]

Introduction

In 2001, the World Trade Organization (WTO) launched an ambitious round of global trade talks named after Doha, the city where the Round got under way. The major aims of the Doha Development Agenda are to advance the "built-in agenda" left over from the Uruguay Round, namely to liberalize trade in services and agricultural products; to further reduce tariffs on industrial goods; to address institutional governance and systemic issues facing the WTO; and most importantly, to address pervasive development-related features of trade. As part of this agenda, the Doha WTO ministerial meeting made a so-called "soft launch" of the Singapore issues:[1] a formal work program and expanded consultations on trade facilitation, transparency in government procurement, the relationship between trade and investment, and the relationship between trade and competition policy, with the final decision on the inclusion of these issues in the negotiations to have been made at the 5th WTO Ministerial meeting in Cancún in September 2003. This latter objective proved to be too ambitious: The stock-taking at Cancún ended when a group of developing countries led by India, Brazil, and South Africa and including China (the so-called G20) walked out of the negotiations in protest over proposed investment rules. Although the main divide was in the farm subsidy negotiations, the Singapore issues became the "official" culprits for the untimely termination of the ministerial.[2]

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[*] While writing this chapter, Erick Duchesne was Assistant Professor, Political Science Department, University at Buffalo, SUNY. As of June 1, 2004, he is Assistant Professor, Département de science Politique, Université Laval. This chapter summarizes research by the author while serving as Norman Robertson Fellow with the Department of Foreign Affairs and International Trade from May 1 to August 31, 2003. An earlier version of this paper was presented at Economic Policy Research Institute (EPRI), University of Western Ontario, on April 12, 2004. The paper has benefited from the comments of participants at the EPRI workshop and students attending PSC 641 (International Political Economy) at the University at Buffalo in the spring semester 2004. The author would like to extend special thanks to Dan Ciuriak and John Curtis for their support, guidance, and friendship throughout the drafting. Any errors are the responsibility of the author. Views expressed are those of the author and are not to be attributed as official views of the Department of International Trade or the Government of Canada.

[1] The Singapore issues take them name from the first WTO Ministerial meeting in Singapore in 1996 at which working groups on these issues were mandated.

However, the breakdown at Cancún does not necessarily signal derailment of the WTO negotiations. Some progress was made at Cancún, including the first indication of preparedness to deal with the Singapore issues individually rather than as a package. Moreover, work goes on in Geneva and capitals to forge consensus on the framework for the negotiations (target date: end-July 2004) and there are indications in the flurry of "mini-ministerials" that WTO members are primed to politically jumpstart the trade talks following the 2004 US presidential elections and changes in the EU Commission, if not before. The present hiatus in negotiations thus provides opportunity to reflect on the "bien fondé" of the Singapore issues.[3]

This chapter evaluates the pros and cons of keeping the Singapore issues on the Doha Round negotiating agenda, not in terms of trade theory, which focuses on the economic welfare gains from trade, but through the lens of International Regime Theory (IRT), which emphasizes the gains from cooperation.

International regimes enhance cooperation among sovereign nations in various ways, including by: "lengthening the shadow of the future", altering the payoffs of a game, institutionalizing the rules of cooperation and defection, providing information to members, reducing transaction costs, facilitating issue linkages, and deflecting domestic lobby pressures. With the WTO's progressive shift from trade liberalization to more contentious rule making, IRT suggests three specific questions about the inclusion of the Singapore issues in the negotiations:

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[2] For early reactions to the Cancún collapse, see *The Economist*, "The WTO Under Fire", September 20, 2003. Chapter 1 of this volume surveys views on the state of play post- Cancún with the benefit of further reflection.

[3] Editors' note: This Chapter was finalized after Cancún but prior to the July 31 agreement in Geneva on a negotiating framework for the Doha Round. The outcome at Geneva, which witnessed one of the Singapore issues, trade facilitation, being incorporated in the negotiating framework and the others deferred can thus be considered in light of the analysis set out here.

(a) Does the WTO, a now fairly well established and successful international regime, facilitate the development of international cooperation in these issue areas?

(b) Looking at the flip side of this coin, would keeping these issues on the negotiating agenda constitute a potential stumbling block for the Doha Development Agenda? Or do they enhance the chances of a successful deal by expanding the feasible set of win-win outcomes (taking into account technical assistance and capacity building to help developing countries implement and benefit from these rules)?

(c) Is the effective "unbundling" of these issues and differentiation in their individual timetables that was signalled at Cancún for the better or for the worse?

This chapter next reviews the negotiating history of the Singapore issues. It then assesses the WTO in terms of the major functions of an international regime as per IRT before turning to a consideration of whether bringing these issues into the WTO regime enhances the possibility of increasing international cooperation in these issue areas. The final section interprets the developments at Cancún in light of the preceding analysis.

Background & Negotiating History of the Singapore Issues

Traditional trade theories are ill equipped to shed light on what occurred at the Cancún WTO Ministerial meeting since the discussions were less about liberalization of trade than about the rules of the international trade and investment game.[4] A trade agreement appeals to governments if it offers greater welfare than would be realized in the absence of such agreement.[5] But the general consensus amongst economists that trade liberalization has an overall net positive impact on welfare (albeit with unclear implications for income distribution) might not apply seamlessly to rule making.

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[4] Truth be told, multilateral trade negotiations began to touch on domestic regulatory policies in the Kennedy Round. The Tokyo Round is just as much known for the various codes that it introduced as for the tariff cuts it agreed. Nevertheless, until the Uruguay Round, negotiations on non-tariff

For almost fifty years following the Second World War, the focus of trade liberalization was the reduction or elimination of discrimination against foreign products. The process was straightforward: members of the General Agreement on Tariffs and Trade (GATT), which subsequently evolved into the WTO, agreed not to take trade-restricting actions against their trade partners in exchange for reciprocal undertakings from their trade partners. By and large, the undertakings (a) were framed in terms of policy instruments (tariffs) that could be measured (i.e., they applied to transparent forms of trade protection); (b) were limited to border measures (giving rise to the characterization of deepening of trade relations in this era as "shallow integration"); and (c) involved restrictions on public policies (i.e., they specified what governments would *not* do), as opposed to commitments to implement specific public policies (i.e., specifying what governments *must* do).

The commitments that underpin shallow integration still form the bedrock of the international trade system, but the new areas of negotiations involve undertakings that would demand reforms of domestic economic regulation, including in the case of the Singapore issues, competition law, rules governing foreign direct investment (FDI), government procurement policies and approaches, and customs and related procedures for processing imports. Reaching consensus on these regulatory issues is more difficult because it involves (in some cases far-reaching) commitments to restructure domestic laws and regulations—that is to say, "deep integration". Moreover, the change

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issues represented a few items out of a larger agenda. In the Doha Round—agriculture excepted—the focus has been on intrusive regulatory issues.

[5] Kyle Bagwell and Robert W. Staiger, 1999, "An Economic Theory of the GATT," *American Economic Review*, Vol. 89, No 1. pp. 215-48.

in negotiating issues also involves a radical change in negotiating approach from an exchange of *comparable reductions in protection* (which left economic regulatory frameworks different) to *different degrees of change towards a common regulatory regime* (e.g., adopting the same regime for intellectual property rights involved little or no change for the US and the EU but radical changes for developing countries).

Writing well before Cancún , Hoekman and Kostecki provided a clairvoyant outlook on the difficulties that the evolution of the WTO agenda portended for the Doha Round:

> Multilateral negotiations on non-border policies, administrative procedures and legal regimes have proven to be much more complex than traditional trade policy talks. It is much more difficult, if not impossible, to trade 'concessions' – instead the focus revolves around the identification of specific rules that should be adopted. The disciplines that are proposed by some countries may not be in the interest of others. Given disparities in power and resources, to a large extent negotiations on rules can be expected to reflect the agenda of high-income countries (and specific interest groups in these countries). In contrast to traditional trade liberalization, the rules that emerge in a given area may not be consistent with the development priorities of low-income countries. No longer is it the case that 'one size fits all' is necessarily a good rule. With the gradual demise of tariffs and the ever greater prominence of non-tariff, domestic regulatory policies – standards, investment regulations, environmental, social, or competition norms – there is a danger of moving away from positive sum ('win-win') games towards zero sum situations.[6]

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[6] Bernard M. Hoekman and Michel M. Kostecki, 2001, *The Political Economy of the World Trading System*, 2nd ed., New York, Oxford University Press, p. 482.

The growing reaction to this shift in international economic policy-making has sparked what some have termed a crisis in global governance.[7] There are two focal points for this sense of crisis: the friction caused by the intrusion of international rules into domestic policy-making, which is manifest in the grass-roots anti-globalization movement;[8] and the splintering of international cooperation, which is manifest in the collapse of the negotiations at Cancún and the parallel surge of activity in negotiating bilateral preferential (i.e., discriminatory) agreements. While the Singapore issues have helped to sail the WTO into the eye of both storms, it is the latter that is of interest here.

Box 1 summarizes the substantive aspects of these issues in the WTO negotiations.[9]

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[7] See for example, Daniel Drache and Sylvia Ostry, "From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance", in John M. Curtis and Dan Ciuriak (eds.), *Trade Policy Research 2002* (Department of Foreign Affairs and International Trade: Ottawa, 2003): 1-31.

[8] Critics of globalization argue that domestic regulatory power is being constrained by international agreements and/or decisions of international bodies (such as the WTO's dispute settlement body) that are not elected or otherwise lack democratic legitimacy. They are alarmed about growing lobbying power of corporations as globalization drives consolidation of businesses and thus greater industrial concentration, with particular concerns being voiced about the ability of multinational firms to lobby for favourable tax or regulatory treatment/changes. Others reply that the system is not broken; community and consumer interest groups can effectively use domestic advocacy and consultative processes to get their views reflected at the global level. They urge activists to work "within the system". They note that a growing number of countries are exercising influence on the tenor or the multilateral negations, thus giving an increasing voice to their constituents. As Sylvia Ostry has argued, such pluralism in global governance "is not only *desirable*, it is *essential* to sustaining and extending the rules-based system." (Ostry's emphasis). See, Sylvia Ostry, 1997, *The Post-Cold War Trading System: Who's on First?* Chicago, University of Chicago Press, p. 239.

[9] For more information, see WTO, "The Doha Declaration explained", http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm.

Box 1: Substantive aspects of the Singapore Issues in WTO negotiations

Trade and investment. Key negotiating subjects and principles include:

- Negotiating modality: similar to commitments on services trade under the General Agreement on Trade in Services (GATS), commitments on investment would be for specified matters ("positive list" approach), rather than in terms of broad commitments subject to listed exceptions.
- The balance between the interest of exporters of investments with those of importers of investments.
- Countries' rights to regulate investment.
- Development-related issues, including technical cooperation with international organizations such as the UN Conference on Trade and Development (UNCTAD).
- The public interest and individual countries' specific circumstances.
- The scope and definition of various issues namely: transparency, non-discrimination, exceptions, and balance-of-payments provisions.

Trade and competition policy. The Doha Declaration instructed the working group to clarify the following:

- Core principles, including transparency, non-discrimination and procedural fairness
- Provisions with respect to "hardcore cartels" (i.e. those formally set up).
- Modalities for voluntary cooperation on competition policy among WTO member governments
- Support for progressive reinforcement of competition institutions in developing countries through capacity building, including through cooperation with organizations such as UNCTAD.

Trade facilitation. The Doha Declaration identifies the following issues:

- Ways to expedite the movement, release and clearance of goods in transit.
- Technical assistance and capacity building to assist developing countries to implement an agreement on trade facilitation.

Transparency in government procurement. Separate from the plurilateral Government Procurement Agreement (GPA).

- Negotiations are to be limited to the transparency aspects and therefore the scope for countries to give preferences to domestic supplies and suppliers will not be restricted.
- Development issues such as technical assistance and capacity building.

Why, it might be asked, did the WTO take on these issues? In the first place, they drill down into domestic regulatory space and thus raise governance issues. Moreover, being non-tariff measures (NTMs), they tend to pose far more complex problems for negotiations than reciprocal tariff reduction.[10]

The first of these issues is at the heart of the longstanding divide on the status of the Singapore issues in negotiations that is reflected in the annual reports of the working groups submitted to the General Council of the WTO. The European Union and, to a lesser extent, the United States have been proponents of opening formal negotiations; they have received significant support from partners within the Organization for Economic Cooperation and Development (OECD). At the other end of the spectrum, some WTO members, typically developing and least developed countries[11], maintain that the case has not been made clearly as to the benefits of introducing such rules into the multilateral system at this time.

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[10] For example, there is no true and tested way to determine whether a nontariff measure genuinely constitutes a protectionist barrier to international commerce versus a necessary element of domestic economic regulation in any given developmental context. Second, the lack of a simple metric to quantify the value of concessions further reduces the chances of reaching an agreement on a reciprocal package involving NTMs. Third, unlike tariffs, NTMs are often "lumpy" (e.g., a measure might either be in place or not, with no in-between); this makes it difficult to calibrate concessions to match reciprocal offers and complicates a process of incremental liberalization. Fourth, unlike tariff cuts, the liberalization of NTMs may require reforms to domestic institutions, which can challenge the implementation capacity of developing countries. Of course, tariff negotiations have also become complex. Early GATT/WTO rounds involved item-by-item concessions. Across-the board cuts were introduced in the Kennedy Round, based on a simple linear 50 percent tariff cut. More complex formulae have since been introduced (e.g., the "Swiss" formula currently in vogue) as have and zero-for-zero negotiations. For a full discussion of reciprocal tariff reduction formulae, see Hoekman and Kostecki, *op. cit.*, pp. 122-35.

[11] While this chapter distinguishes between developing and least-developed countries, it should be acknowledged that there are no WTO definitions of "developed" and "developing" countries. The designation of developing country is derived from a process of self-selection by certain WTO member states and this is not automatically accepted in all WTO bodies. The WTO recognizes the designation of least-developed countries for some of its members in accordance with the United Nations' classification. Unless a clear distinction between "least developed" and "developing" countries is essential, this study will often use the term "developing countries" to refer to both of these latter categories.

To complicate matters, India and some others argue that there is no clear indication in the Singapore Declaration that the Singapore issues fall under the single undertaking prescription. This latter principle, first introduced in the Uruguay Round agreement, stipulates that virtually every item of the negotiation is part of a whole and indivisible package. Some argue that discussion of the status of Singapore issues under the single undertaking requirement should only be addressed in the context of formal negotiations thereon.

Considering the difficult task of defining the contours of the Singapore issues for negotiation purposes, it came as no surprise to most observers of the WTO that the Cancún Ministerial meeting failed to reach consensus on whether to initiate formal negotiations on them. However, there were important developments at Cancún: the Singapore issues were effectively "unbundled" in view of the first sign of flexibility from the EU and other key players.[12] Each issue must now be considered on its own merits.[13] Some indication of the chances for movement on the individual issues can be inferred from a compromise proposal made by the facilitator for these issues at Cancún, Canada's then-Minister for International Trade, Pierre Pettigrew. Under this proposal, trade facilitation and transparency in government procurement would form part of the Doha Round, implying optimism about the chances for early forward movement. Investment rules would be handled in parallel negotiations with no terminal date, suggesting a possibly slower time path. Competition policy would be referred for further study.

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[12] On the last morning at Cancún, Pascal Lamy, the EU's chief negotiator, offered to give up the two most controversial Singapore issues, competition policy and investment, but by then it was too late to salvage the remaining two issues. On this aspect of the negotiating dynamic at Cancún see Pierre Sauvé, "Decrypting Cancún", paper prepared for an "Ad Hoc Expert Group Meeting on the Post-Cancún Agenda for WTO Trade Liberalization and Its Implications for Developing Economies", United Nations' Economic and Social Commission for Asia and the Pacific, Bangkok, 18-19 November 2003, manuscript, at section (ii) "The Singapore issues: convenient culprits?"

[13] The modified EU position is expressed in European Commission, "Singapore issues – Options post-Cancún," Ref. 514/03, Brussels, 30 October 2003. [http://www.ictsd.org/ministerial/Cancún/docs/EC-Sing-Issues-Post-Cancún.pdf]. The desirability of addressing the Singapore issues on their individual merits is strongly supported by several developing countries. See World Trade Organization, Trade Negotiations Committee "The Doha Agenda: Towards Cancún", Communication from Argentina, Botswana, Brazil, China, Columbia, Ecuador, El Salvador, Gabon, Guatemala, Honduras, India, Malaysia, Mexico, Morocco, Paraguay, Peru, Uruguay, TN/C/W/13, 6 June 2003, p. 3.

As efforts to revive and advance the Doha Round proceed, the shape of the negotiating package—what is to be on the table and what is not—remains uncertain. Against this background, we now consider what political science theories of international regimes say about how well placed the WTO is to address these issues.

The WTO through the lens of International Regime Theory

Multilateral cooperation among sovereign nations in the absence of a central authority is explained by political scientists in terms of the concept of an "international regime" which, in Krasner's classic definition, is "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[14] How does the WTO stack up in terms of the features that make an international regime useful?

Lengthening the Shadow of the Future.

A regime lengthens the shadow of the future by creating an expectation among the players that they will interact with each other over an indefinite time horizon.[15] This allows for a "give-and-take" process where the players make incremental concessions and evaluate the behaviour of their counterparts over the long run. This feature of an international regime suggests the utility of a "go slow" approach in the implementation of new rules to allow all parties to test the willingness (and/or ability) of member states to follow up on any agreements.

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[14] Stephen D. Krasner, 1983, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" in Stephen D. Krasner ed., *International Regimes*, Ithaca, Cornell University Press, p. 2.

[15] Readers who are familiar with the Prisoners' Dilemma situation in game theory will recognize that an outcome of mutual cooperation is more likely in a repeated game than in a "one-shot" game, where mutual defection is the rational outcome (i.e., a unique Nash equilibrium) under the usually specified decision rule of risk aversion. The emergence of cooperation in an iterated trade and investment game under the aegis of an international regime follows the same logic. For more discussion on the Prisoners' Dilemma, especially in its iterated version, see among others Robert Axelrod, 1984, *The Evolution of Cooperation*, New York, Basic Books.

The history of the multilateral trading system illustrates well this aspect of an international regime. The series of multilateral negotiations under the GATT/WTO since 1947 furnished learning and reputation-building processes that allowed nation-states to discriminate between "cooperators" and "defectors" and to adjust their concessions accordingly. The results speak for themselves: eight rounds of trade liberalization have been successfully completed, lowering the average tariff from 40 percent at the beginning of the process to about 4 percent with full implementation of the Uruguay Round cuts; trade has expanded much faster than global economic activity, more than tripling the share of trade in global GDP. While there are many exceptions to its rules and many remaining examples of protectionism in the world, the current international system is, compared to other historical periods, in many respects the freest by far.[16]

An incremental approach where tractable issues are addressed first, paving the way for initiatives to address ever more difficult matters, is also a trademark of the GATT/WTO. Such an approach provides an opportunity to observe the consequences of liberalization and to adjust gradually to the new demands of the international economic regime. The GATT/WTO experience adds support to neofunctional theorists who argue that establishing some degree of cooperation as a foothold, however limited, is critically important for long run cooperation.

By lengthening the shadow of the future, an international regime such as the WTO facilitates a gradual breakdown of the resistance to multilateral disciplines in new issue areas.

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[16] For extensive details on trade openness and structure of trade, see Hoekman and Kostecki, *op. cit.*, pp. 9-18.

Altering the Payoffs of a Game.

An international regime can make cooperation or conflict more or less likely by altering the payoffs of a game through "side payments" to participants. In the multilateral trade context, technical assistance to help developing countries to implement and take advantage of trade agreements constitutes such a form of payoff alteration. Such side payments were in fact central to the launch of the Doha Development Agenda.

In economic terms, these side payments are made feasible by the gains from trade realized by the major trading nations that provide or finance the assistance. Their interest in expanding the game leads them to "prime the pump", as it were, to induce wider participation. The role of the international regime is to help overcome the problem of "collective action" implicit in trade-related technical assistance. Any single trading nation cannot capture the benefits from technical assistance that expands the multilateral trade of another country; accordingly, it has no interest in providing such assistance alone. The international regime, however, allows it to capture a share of the overall gain that is, in principle, commensurate with its contribution.

Institutionalizing the Rules of Cooperation and Defection.

International regimes institutionalize rules and norms. This increases the probability of cooperation in two ways. First, participants in a system tend to "internalize" norms; this is in fact a central tenet of legal theory, which holds that most people, most of the time, observe the law, even in circumstances where the threat of punishment is absent. Second, a regime can supplement such internalization by making clear what is a defection and prescribing commensurate remedies/penalties.

The history of the GATT/WTO dispute settlement mechanism serves to illustrate both aspects. If a member of the WTO believes that another is illegally raising barriers to trade, it can lodge a complaint under the WTO's Dispute Settlement Understanding (DSU), which contains explicit rules for determining if a defection has occurred. If fault is found, the complainant is authorized to retaliate to an extent that a WTO panel judges to be commensurate with the injury. In WTO parlance, "retaliation" is a "withdrawal of concessions"; typically, this involves the raising of tariffs on a specific quantum of imports as authorized by the WTO.

The current WTO DSU builds on earlier, and by general reputation much weaker, versions of dispute settlement during the GATT era. The GATT system allowed, until 1989, the appellant to block the formation of a panel to review the case. After "improvements" to the system in 1989, an appellant could no longer block the formation of a panel but could still block the adoption of the panel's report, meaning the system still lacked real teeth. The WTO DSU removed the ability of the appellant to block adoption of a panel report since a blocking motion now requires "negative consensus"—i.e., all members of the WTO had to agree not to adopt. Thus, as Busch and Reinhardt put it:

> The conventional wisdom is that the GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture, resulting in a system in which "right perseveres over might." [17]

Yet, as Busch and Reinhardt go on to show, the GATT-era dispute settlement mechanism was, surprisingly, very "efficacious", yielding concessions to the complainant in two-thirds of the cases brought.[18] Since many of these cases involved powerful rich countries making concessions to poor countries that lacked the market power and institutional capacity to impose effective sanctions, compliance with the GATT rules appears to reflect the normative power of the regime itself.

At the same time, the progressive strengthening of GATT/WTO dispute settlement in terms of enforceability testifies to the importance of a "stick" to ensure compliance when internalization of norms is insufficient. The rapid expansion of the case load of the WTO's DSB since its introduction is seen as having been induced by the increased assurance that a victory at the panel stage would lead to concrete enforcement action.

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[17] See Marc L. Busch and Eric Reinhardt, "The Evolution of GATT/WTO Dispute Settlement" in John M. Curtis and Dan Ciuriak (Eds.), *Trade Policy Research 2003* (Ottawa: Department of Foreign Affairs and International Trade, 2003): 143-183; at p. 143.

[18] *Ibid*. at p.154.

This principle of international regimes suggests that ideally the dispute settlement mechanism would have a role with respect to each new article of the WTO charter.

Providing Information to Members

One of the most important functions of a regime (perhaps surprisingly so) is to provide information about the behaviour of members covered by the regime as well as about their national policy objectives. This information reduces the costs for individual members of monitoring each other's compliance and, by regularly confirming continued cooperation of others, fosters cooperation by all. Information also reduces uncertainty; this is important because uncertainty often causes cooperation to break down unnecessarily.

The WTO fulfils this function of an international regime in a number of ways.

First, it provides a forum for continual communication between member states. For example, WTO members gather regularly in specialized committees, working parties, working groups, and Councils, at various levels of government, including officials and formal Ministerial meetings, to exchange information and views. This regular interaction is an efficient mechanism to promote cooperation and to avoid potential conflicts.

In addition, under WTO transparency rules (which are featured in most of the agreements)[19], members are required to make public their domestic trade regulation. Further, the Trade Policy Review Mechanism (TPRM) provides for regular monitoring of the behaviour of WTO members; importantly, the highly detailed TPRM reports on member compliance with the rules of the regime enable small and relatively poor countries to determine whether others are cooperating or defecting, something they could ill afford to do independently.[20]

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[19] The GATS, the GATT, the Agreement on Rules of Origin, the Agreement on Import Licensing, the Agreement on Customs Valuation, and the Agreement of Trade-Related Aspects of Intellectual Property Rights all contain provisions related to the transparency of domestic procedures.

Reducing Transaction Costs

Regimes increase the probability of cooperation by reducing transaction costs. For example, in order to reach an agreement, many procedural issues have to be resolved: a location has to be selected; a list of invitees must be determined; various protocols (e.g., where people sit) must be established; decision rules for choosing policies must be agreed upon. All these choices or decisions, which must be dealt with prior to broaching substantive talks, represent overhead costs of doing business in the cooperation game. By establishing rules and decision procedures at the start, regimes reduce the cost of all subsequent agreements. In other words, regimes deliver cooperation on the cheap.

In addition, there are major cost savings through the "network externalities" offered by a successful institution. For example, between N countries, there are N(N-1)/2 bilateral relationships. While these costs are distributed (no single country has more than N-1 relationships to tend), the cumulative costs across the system grow rapidly as N rises, increasing the overall benefits of a multilateral agreement that covers all at once.

The GATT/WTO's history of repeated negotiations and steady expansion of membership speak for themselves in illustrating the first aspect of this function of an international regime. The established modalities/protocols for negotiations/accessions combined with the acquired institutional memory of the practical aspects of these processes facilitate progress. Moreover when a new problem is encountered (e.g., how to include Hong Kong as a customs territory), the solution can be repeated (e.g., for Chinese Taipei).

As for the network externalities, these have become significant. Amongst the 147 WTO members[21], there are 10,731 bilateral relationships. Adding the 30 current observers (a country must begin accession negotiations within five years of becoming an observer) would expand that number by nearly 5,000. The more members, the greater the efficiency gains from transacting business through the regime compared to outside it, as shown by the rise in the ratio of the number of bilaterals to the number of members as the latter number expands.

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[20] Transparency during the Doha negotiations is a recurring theme for developing countries. See e.g., "The Doha Agenda: Towards Cancún", p. 1. http://www.southcentre.org/info/southbulletin/bulletin59/bulletin59-03.htm

[21] As of April 23, 2004 with Nepal's accession. See World Trade Organization, "WTO membership rises to 147", WTO News, 23 April 2004,

	Number of Members	Total number of bilaterals	Ratio: Bilaterals to members
Original GATT	23	253	11
Current WTO	147	10,731	73
Current WTO + observers	177	15,576	88

Given the powerful incentives to forge multilateral agreements, why the proliferation of regional and bilateral deals?

The answer lies partly in the realities of economic geography: most nations transact most of their international commerce with immediate neighbours—that is why regional trade agreements (RTAs) are in fact regional. The advantages offered by RTAs have been well documented.[22]

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http://www.wto.org/english/news_e/news04_e/wto_147members_23apr04_e.htm

[22] Regional trade agreements (RTAs) allow the participating countries to extract a good portion of the potential gains from trade in terms of production and distributional efficiencies. Negotiating results can be achieved faster than is typically possible multilaterally and integration can be deeper. Speed can be of the essence in some cases where governments seek to "lock-in" domestic economic reform. RTAs have other advantages as well. They can serve as a testing ground, pioneering the approaches later adopted multilaterally; this was the case with dispute settlement procedures developed in the Canada-US free trade agreement that were later incorporated in the dispute settlement framework adopted in the Uruguay Round. By the same token, experience gained in negotiating RTAs can prepare countries (especially developing countries) for the multilateral stage. And by creating broader zones of harmonized rules at the regional level, RTAs can speed-up subsequent progress at the multilateral level. Finally, a thought-provoking recent article provides an empirical test of rent seeking, in which the author demonstrates under which conditions state leaders might logically prefer to negotiate regional rather than multilateral trade agreements. See Kerry Chase, 2003, "Economic Interests and Regional Trading Arrangements: The Case of

The answer also lies partly in the governance-related diseconomies of scale faced by organizations. These diseconomies appear to become significant once the membership of an organization much exceeds the number of an ideal dinner party—as the Geneva tradition of restaurants lending their names to particular negotiating alliances or "like-minded" groups attests. The discontent that has surfaced within the WTO about the "Green Room" and "mini-ministerial" processes [23] both highlights the difficulties of negotiating amongst 147 members at a time, which inevitably cause the action to shift to smaller groups, and the governance issues thereby raised.

Finally, the perspective on cost-benefits is quite different for a major economy such as the US or the EU versus for a small economy negotiating with one of these two, each of which accounts for a considerable share of the world economy. There are clear advantages for the US to deal one-on-one with smaller trading partners for whom access to the huge US market is a major factor; these advantages are manifest in the US' ability to obtain greater concessions in terms of trade-related intellectual

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NAFTA," *International Organization*, Vol. 57, No. 1, pp. 137-74. But RTAs also have costs. Proliferation of RTAs creates a complex web of preferential tariff rates and rules of origin that divert trade, reducing the overall gains from trade. Empirically, the benefits from such arrangements in terms of trade creation and acceleration of liberalization are considered to outweigh the costs; at the same time, the proliferation of RTAs has made multilateral liberalization, which tends to narrow the margin of preferences, all the more important. For a recent survey, see John M. Curtis, "The Importance of Being Multilateral (especially in a regionalizing world)" in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2003* (Department of Foreign Affairs and International Trade: Ottawa, 2003): 43-71.

[23] Some delegates from developing nations openly lament the lack of democracy within the WTO itself. They remark that the 'Green Room' process, where a small invited group of members meets informally behind closed doors to work out areas of agreement which are then presented to the rest of the membership as a *fait accompli*, and the use of 'invitation only' mini-ministerial meetings relegate plenary sessions to 'mere sideshows' where most important decisions are already endorsed by powerful delegations. See Mark Lynas, "Playing Dirty at the WTO," *The Ecologist*, June 2003 [http://www.theecologist.org/archive_article.html?article=411&category=55].

property and capital movement in bilateral agreements with Singapore and Chile than has proved possible in the WTO.

The outcome of this interplay between the regional and multilateral trade regimes is unclear.

Facilitating Issue Linkages

Regimes facilitate issue linkage. Sometimes cooperation on one issue is difficult but linking the issue with another increases the possibility of cooperation. For example, if a game is essentially zero sum, there is no basis for cooperation, only rivalry. However, if two zero sum games are linked, it becomes possible to trade losses in one game for wins in the other. Depending on the valuation of the respective gains and losses in the two issue areas, the linked games can yield positive sums for both players. In other words, linkage can create a zone of mutual benefits where none exist if the issues are handled separately.

The WTO illustrates this property of a regime particularly well. For example, in the Uruguay Round, linkage between the negotiations on trade-related intellectual property rights (TRIPs), agriculture and textiles helped create a package outcome that satisfied all parties. Linkage has in fact become an essential feature of trade liberalization: following the mandated launch of negotiations on agriculture and services as per the "built-in agenda" agreed in the Uruguay Round, it was generally agreed that a new round would have to be launched to sufficiently broaden the set of trade-offs to create the basis for final agreements in these two issue areas.

Linkage is clearly an important consideration with respect to the Singapore issues—they were after all linked as a group from the time of their entry onto the WTO agenda at the 1996 Singapore Ministerial until the meeting at Cancún. How they will fit into the negotiating agenda post-Cancún—if at all—remains to be seen. Developing countries had insisted on substantial progress on issues within the "development agenda"[24] in order to consider movement on the Singapore issues, insofar as they were willing to countenance them in the talks at all.

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[24] If we were to define the development agenda as issues where developing countries hope to make particular gains, a non-exclusive list would include concessions under the TRIPs agreement for particular health issues

Linking issues can also complicate matters—indeed, the "poison pill" is an example of the use of linkage as a tactic to block progress. Insofar as the constituency for the Singapore issues remains hard to identify (e.g., why at Cancún was Japan adamant on their inclusion in the round to the point of risking collapse of the talks?), a good case could be made for "de-linking" the Singapore issues from the Doha Round.

The future of the Singapore issues on the Doha agenda will ultimately depend on the concessions elsewhere that developing economies might be ready to make to keep some or all of these issues off the table—or alternatively, the concessions that developed economies might consider to keep them on the table.

Deflecting domestic lobby pressure

An interesting and controversial feature of international regimes is the way governments use them to deflect unwelcome pressure from their domestic lobbies. Domestic reforms that have distributional consequences—e.g., removal of a subsidy—are notoriously difficult to make in the face of spirited opposition from vested interests. Nothing is more convenient than to have such a subsidy made illegal under an international agreement to which the nation is party. By the same token, the intrusiveness of international rule-making into domestic governance has become a persistent source of controversy surrounding international institutions under the general rubric of the so-called "democratic deficit". Accordingly, use of this feature of an international regime increasingly risks attracting as much pressure as it might deflect.

Hoekman and Kostecki eloquently describe this feature of the WTO as an international regime: "The WTO is somewhat

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(especially HIV), expanded trade-related technical assistance, special and differential treatment in specific circumstances, and addressing concerns related to implementation of the Uruguay Round agreements. This would be course in addition to basic market access objectives for agriculture, industrial goods and services as well as strengthened disciplines on subsidies and the use of anti-dumping and countervailing duties.

analogous to a mast to which governments can tie themselves so as to escape the siren-like calls of various pressure-groups."[25] In most countries, diverse groups exhibit dissimilar trade preferences. The configuration of protection at any given time is the product of the interplay between demand for protection expressed by various interest groups and the supply offered by responsive governments, which itself is influenced by the lobby pressure from export-intensive industries that stand to benefit from reciprocal liberalization. While governments might objectively prefer welfare-enhancing trade liberalization policies over sustaining the rents of protection-seekers, political calculation might dictate otherwise. The GATT/WTO can help solve this political economy problem by "empowering the exporters"[26] while allowing national governments to "tie their hands" through binding multilateral agreements to reduce the effective supply of protection. Insofar as the WTO enhances trade among nations, few analysts would find fault with this—indeed, Hoekman and Kostecki present this feature in a very favourable light. But would this judgement be carried over to the WTO's involvement in rule making?

There is no easy answer. To the extent that the rules enshrined in WTO agreements represent good practice, irrespective of circumstances, the multilateral trade regime represents both a good model to build towards and a useful support to lean on while getting there. Unfortunately, there are no guarantees that negotiated rules are necessarily welfare-enhancing for all, under all circumstances, as debate on TRIPs has served to illustrate.

It is also more complicated to understand and deal with the dynamics of interest groups on rules issues. When it comes to investment and competition, it is apparent that multinational corporations favour a seamless web of rules, but the lobbies on the other side of the equation are not necessarily the traditional protection-seekers. The structure of trade consultations thus is forced to evolve to reflect the broader interests involved.[27]

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[25] Hoekman and Kostecki, *o.p cit.*, p. 29.

[26] To borrow a term popularized by Michael J. Gilligan, 1997, *Empowering Exporters: Reciprocity, Delegation, and Collective Action in American Trade Policy*, An Arbor, Michigan University Press.

Here we have to carefully distinguish between the situation where governments lean on the WTO agreements to push through reforms they believe are in the interests of their own country and cases where the rules are more or less "forced" on them. Modern China is often cited as an example where the government is said to be purposefully using the WTO agreements to overcome domestic opposition to the market-based regulatory framework that it is putting in place. Developing countries committed to putting in place regulatory regimes to enforce intellectual property rights are often cited as an example of the latter, where the rules are not self-evidently in the country's interests and were adopted under pressure, as the lesser evil to being outside the WTO and exposed to unilateral trade sanctions with no procedural protection from the WTO's dispute settlement mechanism. Unfortunately, it is not possible from the public record to know which circumstance prevails—in both instances, the government claims that its hand was forced!

Insofar as the framework of rules enshrined in the WTO agreements do not represent optimal policies for all—and the risk of this would most likely be highest for countries at an early stage of industrialization—this aspect of the WTO as an international regime could potentially have some negative consequences. Accordingly, even if the WTO were deemed to be a successful regime according to the other six criteria discussed above, it might still meet with legitimate criticism on this score.

This issue is likely to play a prominent role in the case of the Singapore issues, which are not seen as high priority items for the poor countries. Insofar as they remain on the agenda and are part of the final Doha Round agreement, there will be much *ex post* analysis of the pros and cons of this role of the WTO.

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[27] The evolution of Canada's system of trade consultations is described in Dan Ciuriak, " Canadian Trade Policy Development: Stakeholder Consultations and Public Policy Research", Chapter 7 in the present volume.

On the basis of the foregoing, one could safely argue that the GATT/WTO has so far been a successful international regime.

In textbook fashion, it has "lengthened the shadow of the future" by creating stable expectations about the conditions under which trade will take place; it has altered the payoffs to the trade and investment game in a positive direction, channelling assistance to the poor countries; it has institutionalized the rules of cooperation and defection, thereby promoting compliance with its rules; it has provided extensive information to its members to enable them to monitor the behaviour of their fellow members, reducing uncertainty about compliance and thereby fostering greater compliance by all; it has reduced transaction costs of negotiating treaties on international commerce; it has facilitated issue linkage, thereby expanding the feasible set of cooperative deals; and it has provided a credible international framework that governments have been able to use to deflect domestic lobby pressures to push through desired reforms.

Measures of its success abound: the vast expansion of the activity which it oversees; the seven-fold expansion of its membership; the growth in stature and power of its institutions; the large number of treaties concluded under its umbrella (including the eight rounds with their various component agreements as well as the telecommunications and financial services agreements); the many hundreds of disputes that have been brought to it for settlement, the majority of which have resulted in settlement with concessions being made; and the growth of its reputation to actually larger than life status.

The pragmatism and flexibility which the multilateral system has shown in accommodating political pressures are arguably responsible for the long life of the GATT/WTO, which started as a provisional regime that, in the eyes of its founders, would last at most a year or two.

But while the foregoing has emphasized the GATT/WTO's successes as an international regime, there is also a liability column in the GATT/WTO ledger.

Most importantly from a forward-looking perspective, there has been no clear record on its watch of success in integrating developing countries into the global economy or "putting trade into development": the rhetoric of the day holds that the problem with globalization for the poor countries is that they are excluded from it—yet many have long been GATT/WTO members. The perception of lack of benefits from the Uruguay Round, the occasion on which many poor developing countries joined the club, was in fact a contributing factor to the collapse of the Cancún Ministerial as it conditioned the unwillingness of developing countries to enter into negotiations in new rules areas. While it may be unfair to lay the burden of the blame entirely on the GATT/WTO,[28] it has been a factor in creating a separate trading context for developing countries since the 1970s when it introduced systematic discrimination into the trading system through the Generalized System of Preferences (GSP),[29] has long been involved with technical assistance to developing countries to help them take advantage of the trading system, and has played an advocacy role on behalf of trade liberalization. Whatever it has done in these regards has not obviously consistently borne fruit for many of its poorer, small members, which in theory should be the major beneficiaries of the rules-based framework provided by the WTO but which account for most of the disappointments in taking advantage of globalization through trade.

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[28] If we consider the fact that several least developed countries, mainly from Sub-Saharan Africa, have no resident representatives in Geneva, it is hard to believe that they could have had an informed grasp of the intricacies of their WTO obligations when they signed on. The creation of the Advisory Centre on WTO Law (ACWL) at the Seattle ministerial meeting was a step in the right direction, but even taking resource constraints into account part of the responsibility for engaged participation in the Doha Round must come from the members themselves. International NGOs have tried to step into the breach and offered advisory services to the poor countries, but their tactical advice at Cancun has been criticized by some trade professionals.

[29] The GATT Contracting Parties first authorized a GSP scheme in 1971 through a 10-year waiver to Article I (most-favoured-nation clause) of the Agreement, in response to a 1968 recommendation made by the United Nations Conference on Trade and Development (UNCTAD). A subsequent decision of the Contracting Parties on 28 November 1979 (26S/203) titled "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", created a permanent waiver. For further background see UNCTAD website. Many analysts today have come to blame the plight of developing countries on the special and differential measures afforded by the multilateral rules, arguing that accepting the full disciplines of GATT/WTO rules would have promoted better performance.

Equally notably, the two major trade and development success stories of the past decade or so—China in light manufacturing and India in services—forged their successes either entirely outside the framework of the WTO (China joined only in 2001, long after it had become a major trading nation) or through openings driven by commercial innovation rather than negotiated reduction of protection (India's exports of services through outsourcing did not spring into life due to GATS-driven liberalization and thus are in fact vulnerable to protectionist measures as the backlash against outsourcing builds).

Meanwhile, the expansion of its membership is both testament to the GATT/WTO's success and a complication of its life going forward. According to Hoekman and Kostecki, the governance issues posed by the expanded membership might be among the WTO's greatest challenges: "How the members manage to shift from a 'traders club' to a multilateral organization in which 141-plus countries express their views and defend their interest will determine the relevance of the WTO to its poorer countries."[30]

Furthermore, past negotiations have left a substantial implementation "overhang" that burdens the current round of negotiations. Developing countries still struggling to comply with obligations undertaken in the Uruguay Round would rather clear the overhang and deal with the simple core issue of market access before embarking on new rules negotiations; this militates against new rules issues making it onto the Doha agenda.

The innovation of the Single Undertaking to close the Uruguay Round has had the probably unanticipated consequence of making the launch of negotiations on new issues more difficult: without an "opt-out" option, members are much more cautious about agreeing to have an issue put on the WTO negotiating table than they were under the previous regime. By the same token, members also need to pay close attention to internal political considerations at an early stage of the bargaining game.

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[30] Hoekman and Kostecki, *op. cit.*, p. 385.

Finally, as some observers have pointed out, the change in form of the regime from an "agreement" in the GATT era to an "organization" in the WTO era—and one tagged with a name that many find distant, opaque and connoting power, and thus ominous—may have something to do with the fact that the WTO has been a lightning rod for protest where the GATT was not. As is often the case, the WTO may in some ways be the victim of its own success. Bearing that thought in mind, we now turn to a more detailed consideration of the pros and cons of including the Singapore four in the Doha Round.

The "Singapore issues" under International Regime Theory

In this section we consider the four issues on an individual basis, in order of probability of advancing in the near term. Handicapped this way, we look at trade facilitation, government procurement, trade and investment and trade competition policy in turn.

In terms of the seven functions of international regime theory discussed above, two are primarily relevant at the level of the overall regime: namely, "lengthening the shadow of the future" and institutionalizing the rules of cooperation and defection. These pertain to the negotiating framework and the enforcement of rules. The remaining five functions, however, also apply at the specific issue level.

Trade Facilitation

Trade facilitation is the least complicated of the Singapore issues to fit into an international regime framework.

The preparatory work for negotiations has centred on articles V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation), and X (Publications and Administration of Trade Regulations) of the 1994 GATT, which address transparency requirements and reducing transactions costs by expediting the movement, release and clearance of goods. These are classic roles for an international regime.

In terms of deflecting pressures, the WTO as an international regime would at best play a minor role on this issue While an inefficient border does provide some protection for domestic import-competing industries, it is an inefficient form of protection: it simply generates a dead-weight loss on society by raising the costs of trade, as opposed to tariffs that generate revenues for government or quantitative restrictions that create specific rents for particular domestic interests.[31] To be sure, border controls can be manipulated to provide specific protection (e.g., slowdown of seasonal goods through arbitrary inspections) and thus can generate rents; however, there are no domestic constituencies in favour of the general form of inefficiency.

Conversely, business is exerting substantial pressure on the WTO to act in this area. Organizational and technological advances over the past few decades have led to greater specialization and geographic fragmentation of supply chains in production. As a result production inputs can sometimes cross a border several times at different stages of production before reaching their final destination. Delays in crossing national boundaries impose costs on businesses that are part of such integrated production networks,[32] especially those relying on "just in time" delivery in the post "September 11" era.

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[31] Allan Sykes has addressed the issue of "efficient protection" in his paper "*Promoting Efficiency through WTO Rule-making*", presented at the conference *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Center for Business and Government, Harvard University, June 1-2, 2000. The idea is that the WTO removes "distortions" from the multilateral system through its preference for fewer instruments of greater transparency and predictability, and for instruments that have fewer and less deleterious welfare effects — i.e., non-discriminatory tariffs and subsidies (which create transfer payments) in lieu of quotas or regulatory restrictions, which raise rivals' costs and create dead-weight losses through expensive compliance procedures.

[32] Michael A. Doran (1999, "The Simpler Trade Procedures Board" quoted by World Trade Agenda, Geneva) reports that customs-related transac-

An agreement leading to improved customs clearance procedures, harmonized tariff nomenclatures, mutual recognition of product standards and/or certification procedures would represent an efficient step in reducing transaction costs. Because of the generally non-controversial nature of improved efficiency at the border, one would not expect governments to have to lean on the WTO in order to push through reforms.

At first blush, accordingly, trade facilitation seems to constitute a "win-win" situation. Yet, current talks on this topic are not sailing as smoothly as one might expect. The perceived inability by developing countries to implement a WTO customs valuation agreement constitutes an impediment to a successful negotiation. Developing countries also "have doubts about the value of accepting additional mandatory obligations on trade facilitation given weak institutional structures, lack of modern communication and information systems, inadequately trained staff, and so forth."[33] At the same time, development advocates question the allocation of scarce public resources to trade facilitation given competing urgent requirements in health, education and social services.

These factors create an opportunity for the WTO as an international regime to play a positive role in moving liberalization forward in the sense that gains to be made from cooperation on regulatory issues create the basis for side payments in the form of technical and capacity building assistance for least-developed countries which face practical implementation problems.

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tion costs can represent between 2 and 10 percent of a shipment's value. Case studies in a number of developing countries and transition economies suggest that unofficial payments may raise the marginal tax rate on imported products by more than 25 percent (Michael M. Kostecki, 2000, "DHL Worldwide Express: Providing Just-in-time Services Across Borders in Central and Eastern Europe," in Yair Aharoni and Lilach Nachum, eds., The Globalization of Services: Some Implications for Theory and Practice, New York, Routledge). Both studies cited in Hoekman and Kostecki, *op. cit.*, p. 435.

[33] Hoekman and Kostecki, *op. cit*, p. 440.

Transparency in Government Procurement

There is little disagreement that transparency in public procurement conveys benefits.[34] Yet, some question the value and the necessity for a multilateral agreement in this rules area.[35]

The WTO already has a plurilateral agreement involving 28 members on government procurement.[36] It contains disciplines on discrimination against foreign products or suppliers in government procurement involving purchases above threshold levels that vary by level of government (with lower thresholds in the case of central governments.). Key provisions concern transparency of laws and tendering procedures, and provisions for challenge of procurement decisions by aggrieved private bidders seeking redress for decisions they believe were made in a manner inconsistent with the rules of the agreement.

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[34] Benefits that have been identified from a future multilateral agreement on transparency in government procurement include: (a) innovation amongst bidders stimulated by enhanced competition; (b) better value-for-money for governments and budget savings from more competitive bidding; (c) stimulus for formation of partnerships between local and foreign suppliers (especially important for developing countries trying to develop their markets); (d) reduced corruption as a welcome side-effect for all; (e) entrenchment of good governance which is essential to economic development; (e) establishment of a minimum set of rules applicable world-wide that would have the effect of introducing legal certainty to existing procurement procedures (f) attraction of more international bidders and foreign investment. See Report (2003) of the Working Group on Transparency in Government Procurement to the General Council. http://docsonline.wto.org/GEN_searchResult.asp

[35] Colombia, Peru, Cuba and the Philippines have raised questions in this regard. See World Trade Organization, Working Group on Transparency and Government Procurement – Report on the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTGP/M/18 para. 20 and para. 22).

[36] The first Agreement on Government Procurement (GPA) was negotiated during the Tokyo Round and entered into force on 1 January 1981. The present GPA, negotiated in the Uruguay Round and taking effect 1 January 1996, expanded coverage 10-fold expansion, including to services (e.g., construction), and to procurement by sub-national government and public agencies (including public utilities). See: World Trade Organization, "Understanding The WTO: The Agreements; Plurilaterals: Government procurement", http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm, accessed April 24, 2004.

The process launched at Doha is quite separate from the GPA. Its scope is limited to transparency, together with development-related objectives, including technical assistance and capacity building; it does not contemplate restrictions on preferential treatment to local suppliers in allocating government acquisitions. However, unlike the GPA, it is to be part of the single undertaking.

There are also questions about how well prepared the ground is on this issue. For example, agreement has yet to be reached on the definition of transparency;[37] and views are also divided on the scope of the agreement (goods only or including services and concessions) as well as on its relationship to other WTO agreements and procedures (e.g., several developing countries contend that the agreement should not be subject to domestic review procedures or dispute settlement[38]).

Considered from the perspective of international regime theory, if the majority view is correct that the benefits would far outweigh the outlays associated with the introduction of transparency regulations for countries that do not have a procurement system,[39] negotiations on this issue would set up the possibility of side-payments to change the payoffs of the game. This could be accomplished, for example, through a richer technical assistance and capacity building package. A sufficiently rich offer of side-payments might induce agreement to legally binding provisions, which would hasten the realization of benefits in this area.[40]

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[37] This is a valid argument considering that many WTO members are hesitant to enter into negotiations without understanding all of its significance. Many of them are still uncertain in regards to the obligations they have negotiated during the Uruguay Round.

[38] World Trade Organization, Working Group on Transparency in Government Procurement – Report of the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTP/M/18 para. 12 and para. 13).

[39] This view has been expressed by Canada. See World Trade Organization, Working Group on Transparency in Government Procurement – Report of the Meeting of 18 June 2003 – Note by the Secretariat, 7 July 2003 (WT/WGTP/M/18 para. 32).

However, given the practical implementation concerns of developing countries, international regime theory further suggests that "less" might turn out to be "more" in this negotiation. Given the long-term success of the GATT/WTO as an international regime, and taking account of the neo-structural view of the long-term importance of establishing an initial level of cooperation, however minimal, an initial multilateral agreement of limited scope (e.g., goods only, central governments only, higher threshold values for developing countries) would pave the way for deeper cooperation as time goes on.

Trade and Investment

International regime theory confirms the most obvious argument in support of formal discussions on the interface between trade and investment. The large number of bilateral investment treaties that already exist constitute an intricate, uneven and still incomplete set of regulations for international investors. A multilateral agreement (presumably one that goes beyond the minimalist Trade-Related Investment Measures, or TRIMs, agreement reached in the Uruguay Round) could therefore, in principle, reduce transaction costs, both for governments in establishing a seamless set of rules and for businesses in navigating in the resulting environment.[41]

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[40] This is a view expressed succinctly by the Japanese delegation. See World Trade Organization, Working Group on Transparency in Government Procurement – Japan's View on Transparency in Government Procurement – Communication from Japan, 14 October 2002 (WT/WGTP/W/37).

[41] The TRIMs agreement provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT, and requires elimination of all non-conforming TRIMs within two years for developed countries, within five years for developing and within seven years for least-developed. Included is an illustrative list of TRIMs agreed to be inconsistent with these articles including local content requirements and trade balancing requirements. See World Trade Organization, *Legal texts: the WTO agreements*,

As well, consistent with the function of an international regime to provide information to its members to reduce monitoring and other transaction costs, a fundamental principle of any agreement would presumably be transparency. This in itself does not appear to pose problems of a sort not already encountered and overcome in other fields by the GATT/WTO. For example, the TRIMs agreement already requires mandatory notification of all non-conforming trade-related investment measures and establishes a Committee to monitor the implementation of commitments under the agreement.[42]

Nor would there appear to be any particular issues raised by extending the fundamental disciplines of the WTO—national treatment and most favoured nation (MFN) commitments, together with binding of policies. The TRIMs agreement and the hundreds of existing bilateral investment treaties (BITs) typically provide for national treatment; they attest that the basic elements of the GATT/WTO regime can be extended with little or no resistance. Going even just this far and no further with a multilateral agreement might serve the useful purpose of reducing investor uncertainty and thereby reducing risk premia.[43]

But going any further seems to raise any number of issues.

First, investment rules overlap significantly with the GATS Mode 3: commercial presence. Under this mode of services trade, a service is supplied through the establishment of a commercial organization in a consumer's country of residence. Establishing a commercial presence requires investment. The negotiated commitments under investment would accordingly have to parallel those made in services, which specify particular

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http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#gproc, accessed April 24, 2004.

[42] *Ibid.*

[43] See Joseph F. Francois, 1997, "External Bindings and the Credibility of Reforms, in Ahmed Galal and Bernard M. Hoekman, *Regional Partners in Global Markets*, London, Centre for Economic Policy Research, and Raquel Fernandez and Jonathan Portes, 1998, "Return to Regionalism: An Analysis of the Nontraditional Gains from Regional Trade Agreements," *World Bank Economic Review*, Vol. 12, pp. 197-220.

liberalization commitments (positive list approach) rather than listing exceptions to an otherwise liberalized regime (negative list approach). But since foreign direct investment is almost universally sought after for the goods sector,[44] this immediately brings into question the value added of an investment agreement if the main area where it would have a liberalizing effect is in services, which is already being addressed under the GATS.

Second, to reduce transactions costs significantly, a multilateral agreement would have to supplant the current patchy mosaic with, in Sylvia Ostry's words, "a more uniform set of rules with broader application, and particularly rules that will limit the frequent exclusions taken in investment treaties for 'domestic laws, regulations, and policies.'"[45] And the last bit of that quote represents of course the can of worms that has made an agreement on investment so difficult: investment touches on a plethora of domestic laws, regulations and policies. To drill down beyond national treatment and MFN is to almost immediately hit a nerve—or several. For example, investment touches on property rights: any intrusion of international rules into domestic law in this area where the status quo invariably reflects a finely tuned balance between individual, corporate and state interests is, to change metaphors, an intrusion into a minefield, as shown by the controversies surrounding NAFTA Chapter 11 which provides recourse to the courts for changes in government policies unavailable to domestic investors.[46]

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[44] For example, nations engage in policies such as tax competition to attract foreign direct investments (FDI)—while this can create positive externalities such as technological spillovers for local firms, it can have negative spillovers on other countries and result in excessive payment to the investor leading to an inefficient outcome for the world as a whole. See Theodore Moran, 1998, *Foreign Direct Investment and Development*, Washington, DC, Institute for International Economics. Also see Brian Aitken and Ann Harrison, 1999, "Do Domestic Firms Benefit from Foreign Direct Investment?" *American Economic Review*, Vol. 89, No 3, pp. 605-18, and Kamal Saggi, 2000, "Trade, Foreign Direct Investment, and International Technology Transfer: A Survey," *Policy Research Working Paper* No 2349, Washington, DC, World Bank. The problem here is not prying open markets, but rather establishing disciplines on "beggar thy neighbour" behaviour—i.e., obtaining agreement on what type of incentives should be permitted and what types constrained. This is a potential minefield for international rules since the harsh realities of economic geography (where the "core" is a privileged recipient of FDI compared to the "fringe") lead to unequal results when equal rules are applied (to paraphrase Amartya Sen). The significance of this issue has been questioned: political stability, labour costs, and a strong infrastructure have been found more likely to attract FDI than financial incentives. See David Wheeler and Ashoka Mody, 1992, "International Investment Location Decisions: The Case of US Firms," *Journal of International Economics*, Vol. 33, pp. 57-76.

[45] Ostry, 1997, *op. cit.* p. 218.

This highlights the risks that would be encountered by having investment as part of an international regime. Regimes facilitate issue linkage, which in this instance would allow concessions in other areas to provide leverage for movement on investment rules.[47] But unlike the situation with tariff cutting, the trade-offs might not always be between competing commercial interests but between commercial interests and issues that particular societies have chosen to leave outside the commercial realm. Succinctly put, the core concern of those "outside the fences,"[48] is not that the WTO agreements will open up markets where they already exist, but that they will introduce markets where they do not exist. The remaining feature of an international regime to discuss in this connection, namely its capacity to deflect domestic lobby pressures, may not actually deflect pressures in this type of circumstance but simply arouse a storm of protest aimed at the WTO.

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[46] This issue has been front and centre for the various non-governmental organizations, largely environment and development-oriented, that have opposed negotiating investment rules going back to the protests against the OECD-sponsored initiative for a multilateral agreement on investment (MAI). These groups worry that an agreement would give "investors too much scope to oppose and circumvent governments' regulation aimed at social or environmental objectives through provisions on investors-State dispute resolutions." See Hoekman and Kostecki, *op. cit.*, p. 424. See also Stephen J., Kobrin, 1998, "The MAI and the Clash of Globalization," *Foreign Policy*, Vol. 112, pp. 97-109, and Mark Vallianatos et al., *License to Loot: The MAI and How to Stop It*, Washington, DC, Friends of the Earth. [http://www.foe.org/res/pubs/pdf/loot.pdf].

[47] This is even hinted at in the name of the working group, which is not 'investment liberalisation," but "relationship between trade and investment." By creating linkages between trade and investment policies, national leaders could promote a liberal agenda by "tying their hands" to an international agreement. Specifically, "an agreement can be a valuable tool for governments that are hostage to local incumbents that oppose foreign entry by being part of a 'grand bargain'. As FDI and trade are increasingly two sides of the same coin, rules should focus on the full set of policies that affect actors' decisions – both trade and investment-related regulations." Hoekman and Kostecki, *op. cit.*, p. 420.

Trade and Competition Policy

Competition policy would appear to be the fourth seed amongst the Singapore four, being the least advanced in terms of achieving consensus on scope and having all the intrusiveness of investment without the major offsetting attraction of larger FDI inflows which an investment agreement implicitly promises—the benefits flowing from enhanced competition are with rare exceptions[49] diffuse, long-term in nature and hard to directly attribute to specific instruments or policy interventions.

Competition policy is far from new to the WTO: several existing agreements already contain related provisions including the Trade-Related Investment Measures (TRIMs), the Trade-Related Intellectual Property Rights (TRIPs), the GATS and the Telecommunications Reference Paper. Under TRIMs and GATS, members are only obligated, on request, to enter into consultations with a view to eliminate business practices that are deemed to restrict trade. There is no requirement to act, only an obligation to provide information.

To go further, an agreement on trade and competition would have to establish some points of commonality without going so far as to attempt harmonization of national laws (which has been categorically rejected as an objective of the exercise[50]). The work has thus aimed to establish "a set of principles that would embody common values and promote cooperative approaches to competition law enforcement that were in the interest of all Members, while respecting the extensive differences that prevailed in economic and legal circumstances and cultures."[51] And insofar as the implementation of a competition regime mandated by multilateral obligations would present an administrative burden for developing countries, the additional WTO principles of flexibility and progressivity of frameworks would come into play, supported by technical assistance and capacity building pursuant to commitments made at Doha.[52]

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[48] To borrow a term popularized by Naomi Klein to depict protesters who advocate an alternative vision of globalization. See Naomi Klein, 2002, *Fences and Windows: Dispatches from the Front Lines of the Globalization Debate*, New York, Picador USA.

[49] For example, one might see immediately lower prices in the wake of the break-up of a cartel.

Assessing prospects for forward movement is difficult. On the one hand, some delegations have pointed out that their competition laws and/or policies are already consistent with the WTO core principles of non-discrimination, transparency, and due process—which in fact have been described as universal principles of sound governance—without in any way compromising their ability to tailor their legislation to address their own particular circumstances. Indeed, in the deliberations of the Working Group, it has been suggested that developed countries should unilaterally commit to the core principles since most would face few compliance issues.[53] Yet, in the deliberations of the Working Group, there has been much probing into the operational implications and possible broad ramifications of signing onto such obligations. And the concerns here have not only the developing countries cautious of taking on administrative obligations that would be costly or otherwise burdensome. The US, for example, has sought clarification of the meaning of "transparency" in terms of reporting requirements in respect of the hundreds of relevant cases each year at all levels of the federal judiciary.[54] Common law countries have questioned the interpretation of the non-discrimination principle in their context where "the 'law' consisted of both statutes written in broad language and judicial decisions interpreting such statutes?"[55]

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[50] As the Working Group put it in its report to the General Council in 2003, "..*because markets and culture were inseparable, and differed from country to country*, … a multilateral framework on competition policy would have to take cognisance of, and accommodate, *a substantial degree of pluralism in national competition policies*, especially among developing countries, in addition to other, sometimes more interventionist, policies that existed to support development." (emphasis added). See World Trade Organization, "Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council", WT/WGTCP/7, 17 July 2003; at para 18; also see para 16. This position is buttressed by theoretical considerations: because of differing social preferences, it is not clear that international harmonization of market regulation will increase welfare. According to Hoekman and Kostecki (*op. cit.*: 415-16), "in contrast to trade policy – where there are clear-cut policy recommendations – when it comes to regulation and market structure there are few hard and fast rules of thumb that governments can rely on to ensure that agreements enhance welfare. In part, this is because different interests are affected when it comes to regulation […]. *Preferences across societies will differ across countries depending on local circumstances, tastes, and conditions.*" (emphasis added).

[51] World Trade Organization, "Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council", op cit.; at para 16.

[52] *Ibid*, at para 21.

The difficulty in achieving consensus on this issue, despite every evidence of serious engagement and informed debate within the Working Group (not to mention within the OECD which has been grappling with this issue for many years), would appear to reflect in part the myriad issues raised by the general intrusiveness of international rules (in this area or others) and in part by the complexity of the subject matter in this particular area which in turn reflects the non-specificity of the concept of competition policy.

While the problem of intrusiveness is perhaps best illustrated by the sheer number of detailed concerns raised by different parties, one example suffices to bring out the difficulty of establishing even an apparently universal principle such as "fair and equitable procedure": As the working Group has acknowledged, ".. this was a particularly difficult subject area because notions of fundamental fairness in the context of law enforcement disciplines such as competition law differed across legal systems."[56] Some of the questions raised in the Working Group about the interpretation of procedural fairness have included the following: Would rights extend solely to those subject to adverse decisions? Would third-parties have rights in some cases? Would a right to appeal administrative decisions by competition authorities include the review of decisions not to pursue complaints?

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[53] *Ibid.* at para 22.

[54] *Ibid.* at para. 23.

[55] *Ibid.* at para. 29.

In the particular case of competition policy, these problems are compounded by the uncertainty about scope. A narrow interpretation of the relationship between trade and competition policy would limit the focus to competition laws; these typically include provisions against anti-competitive market behaviour (e.g., abuse of dominant market position and collusive practices such as cartels) and anti-trust provisions applying in respect of mergers and acquisitions. A broader interpretation would include "the set of measures and instruments used by governments that determine the conditions of competition that reign on their markets."[57] These could, for example, include privatization of state-owned enterprises (SOEs), deregulation of markets, and controls on subsidy programs. Many of the issues raised in the Working Group's deliberations concern potential ramifications for areas such as industrial policy (e.g., that the non-discrimination principle not somehow reach into policies to nurture development). The responses in the Working Group to these kind of concerns include pointing to the ability to list exceptions and also to a distinction between *de jure* and *de facto* violations of the non-discrimination principle: only the former would be addressed in the proposed multilateral framework, because addressing *de facto* instances of discrimination could introduce "a host of problems."[58] At the same time, reflecting the usual point of the devil being in the detail, the Working Group noted "As to the concerns expressed regarding how the distinction between *de jure* and de facto violations would work in practice, the point was made that it was difficult or impossible to provide definitive answers to the kinds of detailed questions which had been posed concerning a prospective legal text before a negotiation had begun."[59]

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[56] *Ibid.* at para. 35.

[57] Hoekman and Kostecki, *op. cit.*, p. 425. In the context of the discussion in the Working Group, it has been pointed out that eschewing to enact a competition *law*, which small, very open economies such as Hong Kong have chosen to do, is not the same as not having a competition *policy*.

These sorts of issues have already been finessed in the context of previous WTO agreements without a necessary harmonization of laws. What then might international regime theory have to say about the prospects for progress in this area?

First, it might be noted that the sustained process of discussion of this issue since the formation of the Working Group following the Singapore WTO Ministerial is itself an illustration of the way the WTO as an international regime is promoting cooperation. Discussion and sharing of experiences is after all a preliminary form of cooperation.

Secondly, as the exchange of information within the Working Group has served to highlight, the Nordic countries have recently provided a quintessential example of progressive international cooperation in this subject area. Cooperation among the Nordic competition authorities started in the late 1970s/early 1980s with biannual meetings of the heads of the national competition authorities simply to discuss topics of mutual concern. This led to the establishment in 1998 of a committee to propose ways to deepen cooperation. In 2000 the parties adopted non-binding guidelines regarding the exchange of non-confidential information and co-ordination in carrying out investigations, including making so-called "dawn raids" on each other's behalf. Pursuant to these initiatives, practical cooperation has in fact deepened, with information exchange and co-ordination of investigations having become routine in all important competition cases, with positive results, particularly with respect to hardcore cartel cases.[60]

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[58] World Trade Organization, "Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council", *op cit.*; at para 26.

[59] *Ibid.* at para 31. Insofar as the WTO obligations were enforceable, peer pressure aside, it would be through the DSU. In this regard, it was pointed out in the Working Group's deliberations that, to the extent compliance with the WTO regime in respect of, say, the hard-core cartel issue were tested under the dispute settlement mechanism, it would be the presence on a country's statutes of a law against such cartels, not whether the law was being enforced, that could be the basis of a complaint.

This experience illustrates the importance that IRT attaches to establishing a minimal extent of cooperation as the basis for deeper cooperation as mutual trust is built through repeated exchanges. The Nordic experience also illustrates the importance of even apparently shallow forms of cooperation (e.g., exchange of non-confidential information) and patience with gradual progress. Considered in this light, and considering the diversity of the WTO's membership compared to the Nordic community, the WTO's progress on this issue since the Singapore Ministerial might well be judged to be very good.

IRT also suggests that the approach being mooted with the Working Group is sound: proactive engagement by developed countries would "entice developing countries to willingly join the multilateral competition structure, and establish the foundation for regional cooperation."[61] This is but a successful regime expanding by demonstrating its value.

Such gradual accretion of members would be supported by technical assistance and capacity building, illustrating again the capacity of the WTO regime to alter the payoff of a game.

One standard function of an international regime would have to be used carefully since in some cases it would appear to be in distinctly counter-productive, namely the use of the WTO to deflect domestic pressures. Insofar as the WTO were leaned on to take action against injurious anti-competitive practices in the domestic sphere, this would be consistent with the standard benefit of an international regime. However, if the WTO were used to justify introduction of competition laws in the face of competing objectives in the social domain, it would be open to criticism that might be difficult to answer given the difficulty of making tradeoffs between social and economic objectives. As Hoekman and Kostecki note: "while governments may seek to agree on common regulatory principles to govern behavior of public entities or restrict the use of domestic policies, this is best done directly and should not be made a precondition for trade liberalization."[62]

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[60] *Ibid.* at para 63.

[61] *Ibid.* at para 75.

Overall, the promotion of international cooperation in the field of competition policy can benefit through a WTO initiative to address the interface between trade and competition policy. The caveat is that patience is likely to be especially important in this domain.

Conclusion

Five major conclusions emerge from consideration of the Singapore issues through the lens of international regime theory.

First, the WTO is in many ways the quintessential international regime; the introduction of the Singapore issues onto its agenda is in many ways a reflection of its past success.

Second, the WTO is well placed as an international regime to promote international cooperation in the subject areas addressed by these issues. Many of the functions of an international regime lend themselves well to building cooperation in respect of each.

Third, insofar as IRT emphasizes the importance of small beginnings, patient confidence building through shallow forms of cooperation such as information exchange, and gradual deepening of cooperation, it is premature to declare failure on the Singapore issues because a formal launch was not agreed at Cancún; indeed, to do so would be to completely overlook the cooperation that is already "in the bank" in the form of the deliberations of the Working Groups since their inception following the Singapore Ministerial.

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[62] *Hoekman and Kostecki, op.* cit., p. 453.

Fourth, insofar as these issues are to be advanced through linkage to other issues, it is not at all evident that being bundled together was an asset; the effective unbundling of these issues at Cancún may therefore represent an important positive development in terms of allowing each to be linked into trade-offs with other issues on its own merits.

Fifth, seen through an IRT lens, the Singapore four are quite different in terms of the problems that must be overcome to build cooperation. There is no good reason to believe that each of these issues has the same "gestation period" in terms of confidence building before being ready to move to the stage of formal obligations. Accordingly, there was no inherent reason to expect that they could be advanced in lockstep. By the same token, the differentiated timetable going forward that was implicit in the compromise proposal put forward at Cancún by the facilitator for the issues represents a positive development in moving towards a process better suited to each.

Launching formal negotiation on some or all of the Singapore issues at the Cancún would have reinforced the WTO regime, held out the promise of early benefits for WTO members individually and the global economy as a whole, and hastened a deepening of multilateral cooperation that is likely to prove inevitable in the longer run. At the same time, inclusion of these issues in an inadequately prepared form on the Doha Development Agenda as a bundled group subject to the single undertaking would have carried its own risk for a timely completion of the round.

So to answer the question implicitly in the title of this chapter: should we be cheering for the demise of the Singapore issues? The answer to which the analysis above leads is rather that we should cheer for the liberation of the Singapore four from a bundling that was probably unsustainable and that could have constituted a poison pill for the Doha Development Agenda. Each can now be considered on its own merits and allowed to mature at its own pace. The very real record of international cooperation achieved since the Singapore Ministerial is the main payoff to the 1996 initiative. None of that was lost at Cancún; it serves as the base from which to move forward.

Part II

Trade and Development Issues

The World Trade System: Challenges and Opportunities from the Development Perspective

Paul Mably with Susan Joekes and Khaled Fourati[*]

This Chapter reports on a seminar hosted by the Trade, Employment and Competitiveness Program Initiative of the International Development Research Centre (IDRC, 11 December 2003 in Ottawa, Canada). Fourteen presenters addressed five topic areas: the practicalities of multilateralism, governance and negotiations, old and new actors in the trade policy process, conditionalities of market access, and insecurity of negotiated market access (see http://web.idrc.ca/en/ev-51329-201-1-DO_TOPIC.html for the full program and submitted articles). The 79 participants included representatives of United Nations bodies; the World Trade Organization; the Parliament of Canada; Canadian government ministries and agencies; IDRC staff, research partners and networks; universities; NGOs; the private sector; and other experts on international trade policy and development. While names of presenters are referred to in this report, views expressed in discussions are not attributed to individual participants.

The Context

In December 2003, the failure a few months earlier of trade talks at the World Trade Organization (WTO) Ministerial Meeting in Cancún, Mexico, was still reverberating in international policy circles.

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[*] Paul Mably is a consultant in international trade and development based in Victoria, British Columbia. Susan Joekes is Team Leader and Khaled Fourati is a Research Officer in the Trade, Employment and Competitiveness Program Initiative, International Development Research Centre. The views expressed in this article are those of the authors and not to be attributed to the Department of International Trade.

At Cancún, developing countries had shown that they could stand their ground if they stood together. Developed countries, while making concessions on some issues of importance to developing countries, proved unable to offer enough flexibility in two key areas, agriculture and the Singapore issues[1], to woo developing countries back to the negotiating table. Three months after Cancún, no significant advances had been made in restarting WTO negotiations; the US had channelled its energies into bilateral negotiations, the EU its into its expansion. Questions were being raised whether the global trade system could bridge the various divides that stood in the way of consensus: between expectations and the realities of trade agreement implementation, between developed and developing country needs, and among competing forces within societies. The promise of the Doha Development Agenda seemed remote, and the January 2005 negotiating deadline unattainable. Frustration predominated.

On the hopeful side, WTO Members were engaging in informal consultations to relaunch formal negotiations on the Doha Round.[2] The G-20 group of developing countries was about to meet to re-affirm its interest and to seek a way forward on agricultural talks. The 78-member Africa, Caribbean and Pacific (ACP) Council of Ministers had just reiterated the need to continue its alliance with least developed and African Union countries. The EU and other key *demandeurs* had abandoned their insistence on negotiating all four Singapore issues, in favour of addressing one or two of them. The EU had stated that it was also willing to show flexibility on the issues of agriculture, the environment and geographical indications. Services talks still showed a certain dynamism. And the initiative to eliminate subsidies on cotton production, put forward by four West African cotton producing countries, was still alive.

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[1] The Singapore issues include: investment, competition policy, transparency in government procurement and trade facilitation.

[2] Four days after the IDRC seminar, at a WTO General Council meeting on December 15, 2003, WTO members agreed to restart the negotiating groups in 2004.

Cancún and efforts like the cotton initiative had demonstrated for developing countries a certain pay-off from having built an enhanced evidence-based trade policy research capacity. Nonetheless, governments of developing countries remained at a significant disadvantage in any trade negotiation with the better-informed governments of the North in terms of formulating and implementing trade policies that reflect the interests of their people and contribute to their development priorities.

For IDRC, the seminar was an opportunity to assess the extent to which developing country trade policy research capacity had been strengthened as well as the extent to which improved data and analysis had actually been reflected in the formulation and presentation of positions and in building alliances. More specifically, in relation to IDRC's medium-term plans and priorities, the discussions were hoped to inform decisions on various practical issues: How might the IDRC balance its activity across the various trade issues and the various regions? How might it deal with the "trade and poverty" and "trade and development" agendas? And how might it strike a balance between basic research, consolidation of existing knowledge, and knowledge dissemination?

The Practicalities of Multilateralism

This first session looked at challenges faced by developing countries in acceding to the WTO,[3] drawing on the experience of Middle Eastern and North African countries; and at the costs of implementing WTO agreements, drawing on the experience of Argentina.

The Challenges of WTO Accession

Accession to the WTO can be politically complex, technically difficult, time-consuming and expensive. But to the many applicants aspiring to membership, mostly developing countries[4], becoming part of the global trading system justifies overcoming these difficulties. Such is the case for Middle Eastern and North African countries according to presenter **Mohsen Helal** of the Economic and Social Commission for Western Asia.

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[3] IDRC is supporting a multi-disciplinary study to gauge the impact of accession to the WTO, to identify complementary policy initiatives that developing economies might undertake so as to increase the benefits of WTO accession and to establish better practices for planning and negotiating WTO accession. See http://web.idrc.ca/en/ev-41488-201-1-DO_TOPIC.html.

From this region, Jordan and Oman have recently acceded. Currently seeking admission are Saudi Arabia and Libya from among oil producing countries; Algeria, Lebanon and Syria from the group of more economically diversified countries; and Sudan and Yemen from the least developed group.

These countries seek the rights embodied in the WTO agreements and a more secure and predictable trading environment. Moreover, they want to be able to participate in future negotiations. Most plan to diversify their economies and their exports; being part of the trading system is one avenue towards accomplishing this goal.

But the way to accession is not easy. Article XII of the WTO Agreement, which sets out accession requirements, is ambiguous in its wording; as a result, different countries (e.g., Jordan and Oman) end up with different terms and obligations. In fact, Middle Eastern and North African countries have found the process to be an ever steeper road to climb, with requirements becoming ever more onerous and stringent. The region lacks established resident knowledge in these matters.

For Middle Eastern and North African countries, the process is made more complicated due to the need for constant translation of documentation between Arabic and English. The fact-finding stage alone (one of eight accession stages), during which countries gather comprehensive data and prepare memoranda on their trade regimes, can take two to three years.

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[4] Thirty countries currently have observer status in the WTO. With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers. Observers with accession processes underway include Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Cambodia, Cape Verde, Ethiopia, Kazakhstan, Lao People's Democratic Republic, Lebanese Republic, Russian Federation, Samoa, Saudi Arabia, Serbia and Montenegro, Seychelles, Sudan, Tajikistan, Tonga, Ukraine, Uzbekistan, Vanuatu, Viet Nam, and Yemen. The other four observers are Equatorial Guinea Holy See (Vatican), Iraq, and Sao Tome and Principe. (*WTO Website, accessed July 24, 2004*)

New applicants can also face surprises in the accession process. Jordan and Oman, for example, had to make commitments not covered by the WTO Agreements. As well, transition periods for implementation sometimes proved illusory (for example, the Agreement on Aspects of Trade Related Intellectual Property Rights (TRIPS), had to be implemented immediately after signing). At the end of the lengthy and costly process of accession, Middle Eastern and North African countries have found that they faced higher commitments and that other trading partners had managed to gain more concessions than anticipated.

The costs of implementing WTO Agreements

Miguel Lengyel, of the Latin America Trade Network[5], who is carrying out a comparative study of the costs and benefits for Argentina, Peru and Costa Rica of implementing the Uruguay Round Agreements, presented preliminary findings on Argentina, which has gone the furthest of the three.

Lengyel finds that Argentina's level of readiness for the Uruguay Round reforms had varied across sectors. Argentina had been best prepared and had the best institutional capabilities in the area of sanitary and phytosanitary standards (SPS); it had been least prepared to deal with intellectual property rights; and it had had moderate degrees of preparedness in the other areas.

The pace and scope of reform in Argentina has been affected by the macro-level requirement to improve the overall fiscal situation and to generate foreign exchange. Reform processes have, therefore, tended to prioritize short-term changes as opposed to those with the potential to strengthen the institutional framework over the longer term.

The level of political, economic and social conflict associated with the reform process has been affected by the interplay among three variables:

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[5] Further information on the Latin American Trade Network is available at http://www.latn.org.ar/eng_index.html.

- the degree to which regulatory and institutional changes were unilaterally decided versus required under the Uruguay Round Agreements;
- pro- or anti-reform cycles in the local political and socio-economic context; and
- the possibilities of securing compensation for the "losers" in the process (e.g., in privatizing the telecom sector, workers were compensated with shares in the new company).

In general, it was maintained that Argentina has been unable to implement appropriate complementary policies on a timely basis. For example, new provisions on intellectual property rights were not accompanied by competition policies to moderate the pricing practices of the drug monopolies. Two reasons were given for this deficiency: 1) the expectation that economic liberalization would automatically trigger positive changes, and 2) limited fiscal resources and state capacities.

There have been some exceptions. In the area of customs valuation, a system of pre-shipment inspection was established; and in relation to the reforms in sanitary and phytosanitary standards, regional programs were set up.

The cost of implementing the reforms has varied across sectors and according to whether the reforms involved simple changes in rules and regulations or required institution building.

Implementation Costs (US$ millions), 1996-2001	
Customs valuation	252
Intellectual property rights	40
Telecommunications	137
Sanitary and phytosanitary standards (SPS)	87
Technical barriers to trade (TBT)	Not significant
Total estimated costs	*516*

Source: Miguel Lengyel

In considering these data, it is important to make a distinction between costs associated with the mandatory changes required by compliance with the Uruguay Round Agreements and those that were not mandatory but were deemed necessary to reap maximum benefit from the reforms. For example, expenditures related to the regionalization of SPS programs fell into the latter category.

For comparison, the cost of decentralizing Argentina's national education system is estimated to have been US$1 billion over ten years.

The benefits to Argentina from implementation of the Uruguay Round Agreements were related to 1) the timing of implementation in relation to the country's policy priorities, and 2) the suitability of the new disciplines to dealing with the country's policy problems. The study finds that the timing of reforms was positive or highly positive in the case of the border-related issues of SPS, TBT and customs valuation. Timing of implementation-related changes in the non-border-related area of telecommunications was also deemed to be highly positive. However, in the non-border-related area of intellectual property rights timing was considered to be negative (inopportune). Regarding the content of the reforms, and their suitability in confronting the country's problems, the SPS changes were found to be highly positive, and the TBT reforms positive.

Changes to the customs valuation and telecommunications regimes, however, were found to be relatively costly in relation to the results obtained. Lengyel argues that the failure to realize benefits from a more organized system of customs valuation was due to well-documented corruption in that area.

Changes in the intellectual property rights regime were found to be negative. For example, while drug and fertilizer prices increased, there has been no technology transfer and little new investment in research and development. The benefits thus accrued to foreign entities. However, the subsequent establishment of a generic medicines policy under which the government purchased pharmaceuticals from different sources led to more competitive conditions. Prices dropped by 30 to 70 per cent, resulting in a $1 billion saving for the government.

Governance and Negotiations

The second session addressed three related issues: the need for WTO governance reforms to deal with the increasing complexity of the trading system; the institutional implications of the collapse of the Cancún Ministerial meeting; and the strategies and problems surrounding the formation of blocs aimed at increasing developing country clout in negotiations, particularly in respect of agricultural trade.

WTO governance reforms

While not overly worried about the sense of crisis surrounding the WTO post-Cancún, **Robert Wolfe** of Queen's University's School of Policy Studies considers it worthwhile to examine whether the institutional basis of the trading system centred on the WTO is sustainable. He poses the following questions:

1) Can the WTO cope with the substance of its own agenda? Put another way, is there a mismatch between its capabilities and the tasks that it undertakes within the context of increasingly arduous negotiations?
2) Is the cause of the WTO's difficulties procedural inadequacies in Geneva or at the ministerial meetings?

In delving into the first question, Wolfe addresses the workability of the "single undertaking" requirement in negotiations involving 147 Members already and with another 26 countries in accession negotiations.[6] Should there be a two-tier or "variable-geometry" system linked to capacity or levels of development in which Members can opt out of certain provisions—in other words, a system in which some rules would be "soft", subject only to surveillance, rather than "hard", subject to the dispute settlement mechanism. And, are there limits to the norm of reciprocal bargaining?

In Wolfe's view, the single undertaking is essential to holding the WTO together. It operates as a forcing mechanism under the principle that nothing is agreed until everything is agreed. Though it may take longer to agree on easy issues, reciprocal bargaining forces the resolution of the tough issues. It avoids fragmentation of the trade agreement by integrating all the issues into a single "round"—a package that reflects the trade-offs between competing import and export interests, globally and within a given economy. This allows foreigners to influence domestic policies, and creates an incentive for exporters to pressure their governments against protectionism.

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[6] As of July 24, 2004; http://www.wto.org/english/thewto_e/acc_e/acc_e.htm

At the same time, the GATT/WTO has long had some degree of variable geometry. While the same basic rules apply to all Members, the international trading system has long provided for differential application to accommodate national public administration in various areas, including tariffication and domestic support in the Agreement on Agriculture, bottom-up commitments in the General Agreement on Trade in Services (GATS), and the Basic Telecommunications Agreement's "Reference Paper". Under a common set of principles, the details can differ for each Member.

Accordingly there is no need to abandon the single undertaking, or otherwise to shunt developing countries aside in the negotiations, in the interest of moving more quickly.

As regards the procedural issues, Wolfe does not believe that these caused the breakdown at Cancún. A better process would not have saved the meeting, because of the substantive problems. At the same time, he sees room for improvement in the organization's governance and processes. If the WTO's weaknesses in terms of developing country participation in decision making had been a cause of the debacle in Seattle, it is not clear that these weaknesses had in any way been remedied at either Doha or Cancún.

WTO decisions are taken by consensus. Given the single undertaking, that rule is unlikely to change—there is no point in having a vote that would force sovereign states to accept obligations that they will not implement. Indeed, one consequence of the single undertaking and the consensus rule is the aforementioned variable geometry[7]—flexible implementation allows countries to accept common principles. Another consequence is the need to design rules that are not of the "one-size-fits-all" type. The design process for such rules is not simple; this in turn leads to heavy reliance on informal procedures. While formally it is the task of the chair of the relevant WTO body to seek out a basis for consensus, the actual work is done as much in informal meetings—in "Green Room" or "Friends of the Chair" meetings, not to mention in corridor conversations and other informal consultations among small groups of experts and stakeholders with similar interests—as in formal sessions involving the full membership.

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[7] Editors' note: "variable geometry" in the sense of plurilateral agreements that involved subsets of the overall membership was a feature of the GATT long before the single undertaking was introduced to conclude the Uruguay Round negotiations. For example, this approach was featured prominently in the Tokyo Round, which introduced many "codes" (SPS, TBT, anti-dumping etc.) into the GATT. Logically, however, variable geometry can be seen as a consequence of any type of consensus rule, including the single undertaking in a multilateral negotiation.

This model works well for Members that have sufficient trade policy capacity in capitals to analyze all the issues and sufficient numbers of well-versed English-speaking representatives in Geneva to advance their interests in all fora. But many developing countries do not fit this description. Hence the expressions of concern by developing countries and their advocates in civil society about lack of transparency of informal proceedings and the inadequate participation of developing countries in decision making—and the not-unrelated resistance by developing countries to an expanded WTO negotiating agenda.

Since, as a practical matter, progress on substantive issues tends to take place in informal meetings, such meetings are inevitable. The challenge then is to meet criticisms levelled at the informal procedures. Wolfe's suggestions for reform include:

- A longer term than three years for the Director General of the WTO, given the need for continuity and experience.
- Recognition that, in addition to regional rotation of the chair of the General Council, experience and negotiating skills are important qualifications for prospective chairs.
- Creation of a WTO executive committee of ministers, to ensure that the WTO meets its broad objectives.
- Selection of the chair of the ministerial meetings by the General Council, rather than the host country.
- The holding of ministerial meetings in Geneva, which might facilitate the participation of smaller delegations.
- Early selection of issue facilitators for ministerial meetings.
- A more frequent holding of "mini-ministerials" such as that of

July 2003 in Montreal. These serve to build the capacity of ministers, which in turn helps make full ministerials more manageable.

- Adoption of the proposals for the governance of the informal meetings put forth in December 2002 by Sergio Marchi, Canada's Ambassador to the WTO and then-chair of the General Council:
- Members should be advised in advance of informal consultations.
- Members with an interest in the specific issues under consideration should be given the opportunity to make their views known.
- No assumptions should be made that one Member can represent any others except where the Members concerned have agreed.
- Reporting of all outcomes of such meetings back to the full membership.

However, procedural fixes will not address the serious capacity deficit in many developing countries that constrains their ability to understand their interests and to represent these interests effectively at WTO negotiations. It is not sufficient just to block proposals they do not like, as they did at Cancún; they also have to be able to contribute constructively to an acceptable outcome.

There is a role for trade-related technical assistance to help developing countries to understand the existing WTO texts, to implement current obligations and to amend WTO-inconsistent trade practices. But to negotiate effectively, developing countries also need to better understand the problems encountered by their economic actors in pursuing opportunities opened up by trade liberalization.

The collapse of talks at Cancún

John Toye of the University of Oxford, in discussing the collapse of the talks at Cancún and the implications thereof for the trading system, asked if the WTO might not be a victim of its own success in terms of expanding its membership. The WTO's well documented rapid expansion has already decreased its flexibility and agility, slowing down negotiations and institutional reform. Additional Members will only make these problems worse, in part because late-comers to the WTO must "digest" a "take it or leave it, all or nothing" package of rules that they had no hand in shaping, which tends to leave little appetite for further rule changes. For the WTO, this is especially problematic insofar as there is some validity to the so-called "bicycle theory", which suggests that either the organization moves forward continually with new rounds of negotiation, or it in some sense "falls over".

Most of the newer WTO Members have smaller economies, which gives them little individual weight in WTO negotiations (some 126 developing country Members account for only 20 per cent of world trade). At the same time, their diversity makes it difficult for them to form effective coalitions to advance their demands. At Cancún, for instance, Latin American and African countries could not find sufficient commonality of interests to form a unified position.

This is not the first instance in which developing countries have faced this problem. Between 1964 and 1974, the Group of 77 developing countries expanded rapidly to 130 countries. In their attempt to put forward a New International Economic Order, they were only able to agree on the lowest common denominator amongst themselves. As is the case today at the WTO, they had the problem of not being able to get beyond defending a platform and to negotiate on the basis of their common interests. Toye contrasted their situation with that of the EU, which has expanded more gradually, making allowances at each stage for the differences amongst its members.

The sense of common purpose within the global trading system seems to have evaporated. However, even if this could be restored, Toye believes the WTO might not be able to reach consensus since present institutional arrangements are not working. In the context of the WTO, for example, Green Room processes tend to undermine trust amongst the Members, as they raise concerns amongst excluded Members that participants in such meetings might negotiate away something of key importance to them. The quandary this raises for the multilateral system is that informal processes amongst smaller groups might be the only way to come to an agreement.

While Toye is not certain that a two-tier or plurilateral approach would work either, he argues that "unless a more radical approach is tried, we may not be able to reach a consensus."

The fallout from this stalemate was foreseeable: revived activity in negotiating at the regional/bilateral level, including by the US and other big players, such as the EU, Japan, China and Korea.

Developing Countries and the Agricultural Trade Negotiations

Biswajit Dhar, from the Research and Information System for the Non-Aligned and other Developing Countries (RIS) in India next offered a critique of the Agreement on Agriculture (AoA) and WTO agricultural negotiations from the vantage point of a developing country. Dhar perceives an imbalance both in the WTO negotiations overall and in the existing AoA.

Trade reforms negotiated to date have primarily focused on industrial goods; agriculture has been neglected. Yet, in developing countries like India, where two-thirds of the workforce is currently employed in agriculture, the way in which the WTO addresses agricultural trade will have direct implications for the social and political viability of trade liberalization. This imbalance in reforms undermines the legitimacy of the WTO in the developing world and conditions developing country participation in the negotiations as a whole.

The AoA is itself unbalanced, in that it favours developed countries over less-developed Members. Dhar cited several examples of such imbalance in the AoA:

- Supply-management measures are declared WTO-compliant, while production-enhancing measures are not, a distinction that Dhar finds not to be convincing.
- Countries with export subsidies in place before the implementation of the WTO—typically, richer, developed countries like the US and members of the European Union—may continue to use them, while new Members, largely poorer countries, are prohibited from introducing them.

- Domestic support to agriculture by northern countries has remained high, and in some cases is increasing—the US Farm Act of 2002 increased domestic support substantially with many of the commodities receiving enhanced support being of interest to southern exporters.
- Higher levels of tariff peaks across commodity groups in developed countries also reduce market access.

The currently proposed package of agricultural trade reforms appears to continue the uneven approach that favours developed countries. As one participant put it, WTO negotiations appear to be stuck in a pattern of making trade-offs among contending forces rather than seeking to establish balances that enhance the public good. According to Dhar, "We want a package that provides a better system for managing agricultural policies. Then developing country producers will need less protection than they have now." Thus, developing countries need movement on all three AoA pillars: improved market access (e.g., elimination of tariff peaks), phase-out of domestic support (e.g., product-specific reduction of trade-distorting support) and export competition (e.g., early phase-out of subsidies on products of export interest to developing countries)[8], as proposed by the G-20.

A more holistic approach would also bring greater legitimacy to the process. In addition to ensuring effective market access to larger markets, key objectives for developing countries are ensuring food security and sustainable livelihoods.

Negotiating tactics for developing countries

The Doha and Cancún ministerial meetings were notable for the formation of coalitions among developing country WTO Members, such as the Africa Group,[9] that were then able to influence the course of negotiations. **Dominique Njinkeu** of International Lawyers and Economists Against Poverty (ILEAP) spoke of the challenges faced by the Africa Group.

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[8] An outline of the G-20 proposal can be found in Dhar's slide presentation at http://web.idrc.ca/en/ev-51063-201-1-DO_TOPIC.html.

[9] The Africa Group comprises the 30 African countries that are WTO Members.

While an African coalition has emerged over the last few years, its position is still quite weak, according to Njinkeu.

The individual African delegations in Geneva lack resources, information, and timely communication and political direction from capitals. In 2001, the WTO held over 400 formal and more than 500 informal meetings. Preparing for all these meetings and negotiations, let alone participating, is beyond the resource capacities of most African Members. As well, within Africa Group countries, the national-level consensus-building process remains deficient. More work is needed in various areas, including: carrying out research, bringing research results to bear in the policy debate, involving all national stakeholders, coordinating public institutions, and equipping negotiators to make trade-offs at the bargaining table.

At the level of the coalition itself, there is another series of questions that have not been clearly answered. Which issues should the Group put forward and in which particular negotiating forum? To date, the positions of the Africa bloc have been mainly reactive, whereas the need now is for evidence-based proactive proposals. This requires both short-term, practical analytical support as well as research on larger, longer-term issues on which the Africa Group is the *demandeur*. Here the lack of resources is an important constraint.

Lack of negotiating experience also undermines the durability of an African consensus. In order to develop an "African position," African nations must build a consensus and develop a comprehensive negotiating strategy, with the involvement of all the main stakeholders. This is very difficult due to continental, regional and national conflicts of interests. How should the negotiating teams be structured? Which country should take the lead? How are conflicting interests within the bloc to be consolidated? What is to be the involvement of stakeholders with vested interests? To what extent should negotiating teams include advisors seconded from interested private sector entities, research institutions and centres of excellence? What incentives are needed to keep officials and advisors involved in Geneva and in capitals throughout the Doha Round?

For African WTO Members to move to the next level in terms of negotiating ability pre-supposes the availability of people who understand the cultural modalities, realities and interests of different parties to the negotiations. Africa Group negotiators need issue-specific analytical support. This includes background research, the preparation of evidence-based proposals, the review and assessment of the Group's own submissions as well as of those put forward by other WTO Members and/or by negotiating group chairs, and analysis of the constraints on implementation of proposals.

Education and public awareness are also needed to underpin informed dialogue on the part of developing country public and private stakeholders on country options and positions. Media strategies are important in this regard; currently, public opinion is often not informed by good research and analysis.

While articulating a coherent position for African countries is critical to their obtaining benefits from the WTO negotiations, engaging African countries in the process is difficult because their interests are very loosely defined at present; and policies are sometimes based on ideology rather than good data.

To take an example, the EU is currently trying to negotiate regional agreements with central and eastern African nations, regions that have the least capacity to negotiate because they have not yet identified their own best interests. The challenge for international groups is to support sustained rigorous research that will help African nations and other developing countries to get a handle on the issues, to formulate negotiating positions in line with their interests, and to stay abreast of developments.

New Issues and New Actors in the Trade Policy Process: the Singapore Issues and the NGOs

The inclusion of the Singapore issues in the WTO negotiations, a major source of disagreement between developed and developing countries at Cancún, has increased significantly the complexity of the trade policy process and underscored the importance of engaging a wider set of stakeholders. This development has also prompted heated commentaries from, and intensified engagement in the WTO process by, many non-governmental organizations. This third session heard the perspectives of two such NGOs, the International Institute for Sustainable Development (IISD) and Consumers International (CI), and looked at research gaps on the Singapore issues[10].

Mark Halle of IISD suggested that an inability to bring economic, social and environmental policy into coherence is at the heart of many of the challenges faced by the WTO, and by its developing country Members in particular. He argues that a sort of class system of policy issues reigns at the WTO. While lip service is paid to the importance of policy coherence across the various issues, in reality issues such as agriculture and non-agricultural market access have more political support than environmental policy. The goal of reaching mutually compatible, complementary, and supportive policies in cross-sectoral arrangements, with trade contributing not only to economic growth but also to the public good, cultural diversity and sustainable development, is far from being achieved. The result is clashes over national policies and over the direction being taken in developing international trade law.

All solutions rest on good governance, which in turn depends on access to information for stakeholders to help them participate on an informed basis in trade policy development and to promote democratic accountability of governments for the trade deals that they negotiate.

Halle describes the appetite for research in Geneva as "colossal", pointing to the plethora of policy papers, proposals and feedback, although research interest in the Singapore issues has taken time to develop and needs to be stimulated through greater advocacy. The analysis of trade policy is not restricted to the academic community; NGOs have also become providers[11], as well as playing an important role in public education and engagement. Halle drew attention to the interest among civil society groups, as exhibited in the grassroots demonstrations at the G-8 Summit and other events. Such demonstrations are, in his view, a legitimate tool for bringing issues to the public agenda.

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[10] Among the Singapore issues, IDRC's focus has been mainly on competition policy, through projects in the Middle East and North Africa, in the Caribbean, and Peru. See http://web.idrc.ca/en/ev-5969-201-1-DO_TOPIC.html and http://web.idrc.ca/en/ev-5971-201-1-DO_TOPIC.html.

[11] For example, IISD has helped launch an initiative on treatment of environmental issues in trade negotiations and is now engaged in a project on one of the Singapore issues (investment) with a view to helping developing countries set the agenda rather than having it set for them. Halle pointed

Kamala Dawar of Consumers International (CI)[12], took up the role of effective competition in promoting fair markets for consumers. In 1993, CI urged the WTO to include competition policy in its agenda, and welcomed the WTO's formation of a Competition Working Group at the first WTO Ministerial Conference in 1996. At Doha, CI stressed that further discussion was needed on competition policy before moving to negotiations. CI subsequently produced a global report on competition based on the analysis of seven developing and transitional economies. Each of CI's regional offices, located in Asia, Africa, Latin America, and Europe, also worked independently on competition issues related to their regions.

CI members encountered difficulties in this work due to widely differing views on the negotiation and application of multilateral competition agreements, and how they relate to national laws. Therefore, in 2002, CI commissioned a discussion paper on the need for multilateral competition agreements. The results indicated a need to further analyze the existing GATT/WTO Agreements and to explore the more technical is-

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to the trade policy networks supported by IDRC and others as good examples of where this latter type of activity is beginning to happen.

[12] CI is an independent, non-profit NGO, with more than 250 member organizations in 115 countries. CI is funded by member fees and through grants from foundations, governments, and multilateral agencies. Its mandate is to lobby the WTO and other global and regional organizations to promote consumers' rights and responsibilities. It is the voice of the international consumer movement on product and food standards, health and patients' rights, the environment and sustainable consumption, and the regulation of international trade and public utilities. CI engages policymakers, practitioners and scholars in its capacity building and campaigning efforts. CI is run by its members, comprising independent national consumer organizations, local or limited-issue organizations and government bodies active on consumer issues. For a description of the IDRC-supported project with CI, "Consumers and the Global Market", see http://web.idrc.ca/en/ev-6600-201-1-DO_TOPIC.html.

sues involved in framing a multilateral competition agreement in the context of the WTO. A subsequent technical report was commissioned to identify the various consumer perspectives that should be incorporated into any discussions on a multilateral competition agreement.

CI continues to promote competition at the multilateral level, including the possibility of a consumer-oriented policy at the WTO. But the inclusion of competition policy with the other Singapore issues added significant complexity to ongoing negotiations, Dawar said, and prompted CI to recommend an evaluation of each of the "new issues" based on their individual merits. CI also called for continued work and further clarification on competition issues, particularly those concerned with hardcore cartels, and a delay in formal negotiations, especially within the context of a single undertaking.

Commenting on the difficulties for NGOs in engaging on WTO issues, Dawar noted that, unlike Codex Alimentarius and the International Organization for Standardization, the WTO does not formally recognize NGOs, its negotiations are ad hoc and dysfunctional, and its meetings vast and inaccessible. These characteristics militate against effective NGO engagement in multilateral trade negotiations.

Simon Evenett[13] of the University of Oxford commented on the state of policy-relevant research on the Singapore issues (including gaps), the degree of knowledge diffusion and learning among stakeholders, and measures that might help close the gaps and foster meaningful dialogue among stakeholders.

Evenett's analysis focuses on three key elements, individually and in interaction:

- The actors—NGOs, scholars, trade negotiators, journalists, and other experts.
- The knowledge, including trade policy proposals and impacts on developing countries.
- The different fora for the dissemination of knowledge and interaction among actors.

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[13] Though unable to be present in person, Evenett presented in video form the findings of his work on this topic.

As benchmarks – those components that should be found in any rigorous development-related policy-relevant research – Evenett's study used the following criteria:

- a detailed evidentiary base;
- established analytical tools for WTO–related matters;
- relevance to developing countries;
- evaluation of actual policy proposals; and
- evaluation of possible policy options.

New issues such as TRIPs, investment, and competition policy are all of great importance to developing countries but are under-researched (in contrast to the study of trade in goods). Both the evidentiary base and analytical tools are lacking, and typically neither actual not alternative policy proposals are evaluated. This is likely due to the lack of incentives and resources to engage academic researchers, NGOs, and officials.

Evenett particularly noted the low degree of knowledge diffusion in respect of two of the Singapore issues, government procurement and competition policy, citing the relative paucity of citations by trade negotiators, scholars, and civil society (especially in developing countries) of published sources, including national experience, WTO submissions, scholarly research, and civil society reports. Writing on these issues reveals a low level of mutual interaction leading one to question the impact of all the pre-Cancún workshops. The conclusion is that instead of being structured for the purposes of dissemination of information, future workshops need to place greater emphasis on effective interaction amongst the various actors and on the facilitation of learning.

To remedy this unsatisfactory state of affairs, Evenett recommends strengthened incentives for academics and NGOs to produce good quality policy-relevant research, and for governments to develop an appetite for learning about that research. Consideration might also be given to building better fora to encourage learning and the diffusion of new ideas about trade policies.

Conditionalities of Market Access

Standards of various kinds can be perceived as barriers to market access by developing countries, conditioning the access they thought they had achieved in negotiations to reduce tariffs and quotas. In the fourth session, three presenters addressed the impacts of three different orders of standards: product standards (sanitary and phytosanitary standards as applied to South Asia), sustainability standards (applied to coffee production), and labour standards (in the context of South America).

SPS Standards and the issue of trade protection versus consumer protection

Veena Jha, of the United Nations Conference on Trade and Development (UNCTAD), reported on an IDRC-funded project that examined whether sanitary and phytosanitary (SPS) product standards function as hidden restrictions and non-tariff trade barriers that reduce the benefits of liberalized agricultural trade to developing country exports and exporters.

Developing countries that are seeking to expand agricultural exports consider SPS measures to be as important as traditional WTO issues such as tariffs and quantitative restrictions—hence, the Agreement on Agriculture and the SPS Agreement were negotiated in the Uruguay Round as part of an agricultural package.

Most developing countries are standard takers rather than standard setters (where they *are* standard setters, it is usually with the help of NGOs and aid agencies). In addition to the usual capacity problems encountered in the areas of legislation, training, infrastructure, and engagement in international negotiation, Jha cited a number of potential problems faced by developing countries in coping with SPS standards:

- Lack of transparency—for example, continually changing standards can create a "moving goalpost" effect.
- Complexity of SPS standards—for example, particular thresholds can be appropriate for one product but not for another, generating implementation difficulties.
- Changing threshold limits—changes in importers' threshold limits, which can have significant implications for the production process, are often made with little consultation about the implications for developing country producers. Rising standards also seem to be creating a burgeoning market for assessments; as standards are raised, more conformity assessments are required.

- Relevance of particular standards to the production conditions in the exporting country—for example, a requirement for use of potable water for cleaning.
- Distortions in industrial development—for example, heavy compliance costs can lead to concentration and "cartelization" of industry by raising the bar for small firms seeking to participate in trade.

The UNCTAD project asked the question: "Can SPS measures and environmental standards be protectionist?" The project looked at fisheries products, peanuts, rice, spices and tea in four South Asian countries. In the fisheries sector, the perception is that certain standards are not strictly relevant to product quality. Some are felt to be too stringent given Indian fishing conditions. Indian plants appear to face more stringent standards than European plants. The consequence is that, out of a total of over 400 processing establishments in India, only 86 have been approved to export to the EU. Many small companies are excluded. It was maintained that the legitimate objectives of SPS standards could be met by less cumbersome and less costly procedures.

On peanuts, a sort of standards escalation seems to have occurred. Different testing procedures (for aflatoxin contamination) and conformity assessments are required in different markets. As well, a new sampling plan (the three-test Dutch code methodology) would result in higher rejection rates and reduced export revenues. This multi-test regime could increase the cost of testing and compliance substantially (e.g., the UK government estimated that compliance costs would run to 8 percent of turnover—the Joint European Commission Food Association estimated the increased costs of doing business in the EU market could be more than US$ 200 million). In the peanut market, the setting of high standards can work much the same as tariff escalation. For example, if standards for raw peanuts are less stringent than for processed peanuts, the incentive structure favours processing in the final market—so the standards are protectionist. This also applies to rice and tea.

Lessons have been learned at the national and multilateral levels. At the national level, there is increased awareness that national and regional standard setting (including branding and umbrella certification) is part of the development process and becomes as important as technology, innovation, and enterprise development. At the multilateral level, transparent and participatory development of standards is deemed essential. Trade rules should give space to developing countries to challenge the standards. International assistance must be directed toward building capacities for standard setting. While this is already happening in some sectors, more needs to be done. Mutual recognition agreements on standards, while good in theory, have not been adequately explored—the dynamics and politics of standards-setting procedures mean that the large players tend to dominate. The pattern of standards-setting may also reflect the pattern of trade flows.

Standards for sustainability—the case of coffee

Since the fall of the quota system within the International Coffee Organization (ICO) in 1989, the coffee market has followed a path toward increased trade liberalization; currently, effective tariff rates on coffee are near zero in the developed world (Canada and the US impose no tariffs on coffee). But, according to **Jason Potts** of the Sustainable Commodity Initiative, a joint venture by the International Institute for Sustainable Development (IISD) and UNCTAD[14], the depth and scope of the challenges to sustainable development in the coffee sector have increased in this period—prices have become more volatile, market concentration has grown among intermediaries (coffee buyers and processors) and access to market information and extension services for small producers has declined. Growers have seen their share of final revenues fall dramatically and they have responded by increasing output, exacerbating a downward, environmentally damaging spiral. Thus, liberalization of commodity trade does not, by itself, necessarily lead to sustainable development. The trade liberalization agenda has its limits.

One approach to guide trade-driven development is the use of sustainability standards. Sustainability standards provide a novel opportunity for stakeholders to have a direct influence on market conditions, and they bring diverse groups into discussions of trade governance, including producers, civil society, and industry. The positive results are improved information flow among actors, improved management of supply chains and improved social and environmental conditions. The generation of distinctive markets (with their accompanying price premiums) could also be a benefit for developing country producers but most of the gains have been taken by intermediaries.

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[14] See description of IDRC project "Exploring Opportunities for International Cooperation Towards a Sustainable Commodities Sector: A Case Study in Coffee" at http://web.idrc.ca/en/ev-39528-201-1-DO_TOPIC.html.

Sustainability standards for coffee were first mooted with the establishment of the Fair Trade Labelling Organization in Holland in 1989. Since then, a number of other standards touching on various aspects of sustainability have entered the market. Unfortunately, the propagation of multiple standards has produced confusion about what the term "sustainability" means, to producers, governments and consumers. There is inconsistency among the standards; it remains unclear what are their relative impacts as well as the opportunities and advantages that they offer.

Other challenges facing the effective use of sustainability standards are the following:

- Representatives of developing countries are frequently absent from the initial development and implementation stages of sustainability initiatives—for example, fair trade standards.
- Sustainability standards can operate as barriers to trade or restrictions on market access (for example, the definition of "like products" under the WTO is based on the physical characteristics of the product, degree of substitutability in the market, and consumer use, but does not provide for distinctions based on process and production methods that might be relevant for sustainable development);
- Costs associated with sustainable practices are still borne by producers rather than being externalized in the market as a whole. At the same time, economies of scale are threatened.

When sustainability standards are designed and implemented without government support or intervention, typically there is no conflict with WTO rules. When policy support *is* provided, such actions may be challenged under the WTO in two areas:

- Under Article I or III of the GATT, which prohibits distinctions based on process and production methods (PPMs). Though GATT Article XX provides for exceptions relating to the conservation of exhaustible natural resources, the availability of a defense of a given measure using this exception would depend on the interpretation of a WTO panel and the Appellate Body of the facts in the given case.[15] No exception addresses "sustainability" as an integrated concept.[16]
- Under the Agreement on Technical Barriers to Trade (TBT), which requires NGO standard-setting bodies to comply with the code of good practice.

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[15] Editors' note: In the commentary on the use of GATT Article XX (or the corresponding provisions in the General Agreement on Trade in Services which are found in Article XIV of that treaty), the exceptions are often described as being "narrowly" or "strictly" interpreted, with some commentators seeing a "broader" reading of the provisions in two of the more recent cases in which the exceptions were invoked (including importantly the *EU-Asbestos* case in which the WTO upheld an EU ban on imports of asbestos based on the EU's Article XX defence of the measure). The Appellate Body has consistently held that a balance must be struck between the right to invoke Article XX exceptions and the rights of the other Members under the Treaty. In point of fact, if a dispute arises, a *prima facie* case must be made both by the WTO Member invoking the exception and by the Member(s) challenging it as to its applicability/non-applicability. The WTO panel and the Appellate Body must decide which is the more compelling case.

[16] Editors' note: The Preamble to the WTO Agreement, which informs the interpretation of GATT Article XX and other covered agreements, acknowledges "the objective of sustainable development" in connection with "the optimal use of the world's resources". Under the conventions of treaty interpretation, a WTO panel and/or the Appellate Body would seek to give the term "sustainable development" its usual meaning. Since the term has been given various articulations, one cannot prejudge which meaning would be adopted in a particular case. However, it is difficult to conceive the WTO bodies not taking into account an authoritative source such as the Brundtland Commission which interpreted sustainable development as meeting the needs of the present without compromising the ability to meet the needs of future generations, or other standard articulations in terms of the "carrying capacity" of the planet, or the relationship between economic, social and environmental goals. Accordingly, while Article XX does not provide an exception for "sustainable development" *per se*, the concept could be adduced in connection with an Article XX exception.

Sustainability standards could be made more effective catalysts for sustainable trade through progress in three areas:

- More equitable, transparent and inclusive government and global structures for standards development (e.g., along the lines of the Sustainable Coffee Partnership), to make standards consistent over geography and time while reducing the potential for market barrier problems or running up against a TBT or GATT Article I/III challenge. In Potts' view, an equitable structure would enable participation and representation of all key stakeholder groups (including from developing countries), not just importers, in standards development.
- Clarity and consensus on the impacts of different standards.
- Proactive policy support to address public goods issues.

Potts also argued that there is a need for redefinition of "like products" under the WTO to allow process and production methods to serve as a basis for distinguishing between products, under specific conditions.

Labour Standards

Miguel Lengyel of the Latin American Trade Network gave a presentation based on a paper he co-wrote with Pedro Da Motta Veiga on labour standards in South America[17].

In the 1990s, two main patterns were observed in the linkage of trade to labour standards. 'Hard conditionality' to induce compliance was employed in preferential trade agreements and unilateral trade policies consolidated at national levels. 'Soft conditionality' was manifested in multilateral trade negotiations. Both were governed by a top-down rationale.

Multilateral trade negotiations have moved away from the idea of a uniform global labour standards regime toward agreement on a reduced set of fundamental labour rights; and from the use of trade rules to enforce adoption of higher labour standards, toward a more cooperative approach (i.e., soft conditionality). Key episodes underpinning these moves were the 1996

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[17] Pedro da Motta Veiga and Miguel Lengyel, "International Trends on Labor Standards: Where Does MERCOSUR Fit In?", *Inter-American Development Bank and Latin American Trade Network*, June 2003

Singapore WTO Ministerial Declaration, the failure to re-establish the trade-labour link at Seattle in 1999, and the Doha Declaration in 2001. The WTO is likely to continue to figure in future developments regarding the linkage of trade and labour standards, although it is uncertain exactly how.

Preferential trade agreements and unilateral trade policies have also moved away from the imposition of uniform rules and forced convergence of national regulations around "best practices" in favour of, on the one hand, proposals respecting national norms and, on the other, toward the greater use of trade sanctions to promote higher labour standards (i.e., hard conditionality). Key developments in these regards included the Labour Agreement within the framework of the NAFTA, the evolution of US domestic policies such as the 2002 US Trade Promotion Authority Act, the 2002 US–Chile FTA, US proposals on labour standards in the context of the negotiations towards a Free Trade Area of the Americas (FTAA), and the negotiations towards a Central America Free Trade Agreement (CAFTA).

In parallel with these state-led top-down initiatives to link trade and labour standards, there emerged in the 1990s a set of more decentralized or bottom-up initiatives (including by non-governmental organizations and local governments). These initiatives were driven variously by business concerns, pressure from labour organizations, NGOs and activists, and government policy priorities. Substantively, the initiatives tended to seek development of workplace or production-chain monitoring of adherence to ILO fundamental labour standards and occupational health and safety issues.

In Lengyel's view, Latin American countries now regard trade agreements as potential mechanisms for raising labour standards—but that trade sanctions as a means of forcing compliance are not helpful. Sub-regional agreements might hold some answers.

Insecurity of Negotiated Market Access

Market access is also made insecure by the frequent use of trade remedies. The fifth and final session of the day comprised presentations on the South African experience with safeguards, anti-dumping and countervailing measures; the use of WTO safeguards against developing countries by the US, EU and Japan; and sovereignty and WTO trade remedies in developing countries.

South Africa's experience with trade remedy actions

Anti-dumping has been the most frequently used trade remedy instrument over the past two decades. Traditionally an instrument of choice of OECD countries, its use by developing countries, especially larger-market developing countries such as Brazil, India, and South Africa, has increased dramatically since the mid-1990s, including against each other. Countries have been getting more adept in the use of this instrument, and retaliation is becoming increasingly evident. According to **Peter Draper** of the South African Institute of International Affairs, this represents a "worrying trend in the use of anti-dumping as an instrument of trade defence."

Drawing on published research, Draper said anti-dumping was used as a trade instrument in 2,859 cases between 1980 and 2000. Developed countries were by far the most frequent users, with 42 per cent of the cases pitting one OECD country against another.

But the figures tell a different story for the period beginning in 1995. While middle-income countries tended to target OECD members more in those years, possibly as a form of retaliation, lower-income countries tended to be targeted *by* the OECD in labour-intensive sectors like clothing and textiles.

In every five-year period since 1980, more than 85 per cent of anti-dumping actions occurred in the resource-intensive and science-based sectors. Contrary to the common belief that domestic specialization drives the use of trade defence instruments, countries did not necessarily seek to protect industries where they had comparative advantage: OECD countries tended to focus most on resource-based sectors, particularly steel. And some of the poorer countries were most aggressive around science-based industries, in an apparent attempt to build up their capacity in that area, as opposed to protecting an existing advantage.

Between 1995 and 2002, South Africa, Brazil, India, Egypt, and Thailand all faced a dozen or fewer challenges per year, while China was "in a league of its own" being the target of 26 actions in 1995, rising to 37 in 2002.

In South Africa, out of a total of 33 cases since 1995, 26 have focused on the steel sector and its sub-sectors, reflecting a South African trading advantage built on very low electricity rates. South Africa has been targeted by larger-market developing countries as well as by OECD members.

But Draper acknowledged that South Africa has also become a notable user of anti-dumping, increasingly against other developing countries. In part, this reflects the fact that, when the Uruguay Round was concluded, the country's new head of tariffs and trade encouraged companies to file anti-dumping cases.

Draper warned of the potential danger of increased trade insecurity: "If the global economy moves into a downswing, then the use of anti-dumping is likely to rise," he said. Ironically, further liberalization is likely to lead to the same protectionist impulses that arose in South Africa after trade barriers came down post-1995. Draper suggested that it would help if the use of anti-dumping were subjected to additional disciplines through multilateral trade negotiations; but it remains to be seen whether the US Congress will agree to that.

Use of WTO safeguards against developing countries by the US, EU and Japan

Milos Barutciski, of the law firm Davies Ward Phillips & Vineberg LLP, observed that, while negotiated market access commitments are often seen as a solid floor, they are subject to a complex series of contingent trade remedies, including anti-dumping (AD) actions, countervailing duties (CVD) and safeguards. The result is that "the [negotiated market access] floor isn't quite as solid as the one we are standing on here today."

In principle, AD and CVD remedies are not designed to cut back on negotiated market access; rather, "they are attempts to level the playing field once the exporting country has done something nefarious." Safeguards, on the other hand, *are* intended to cut back access, but only in the event of a surge of imports that causes or threatens to cause injury to domestic industry, and then only for a specified period, and with negotiated or unilateral compensation to the countries targeted by the safeguard action.

Of these measures, anti-dumping has been by far the most popular. Over the period 1998-2003, the EU launched 157 anti-dumping cases, 99 of them against developing countries, while the United States initiated 224 cases, including 109 against developing countries. By contrast, there were only 32 EU and 50 US countervail complaints over the same period. And only two safeguard cases originated in each jurisdiction during this period; Japan had none.

While the rules themselves are robust, and when they have been used, they have been used to effect, it is not easy to mount a case. Part of the problem is that most complaints involve multiple producers, and it is rarely in a single exporter's interest to incur the legal costs and to make the political investment involved in convincing a domestic government to launch an investigation. It is difficult enough in Canada, the US or the EU to mount a trade remedy action; in the more cash-strapped developing countries, it is near to impossible. In Barutciski's judgement, this renders these remedies relatively ineffective for many developing countries: indeed for many developing countries such protections are "fundamentally illusory".

That being said, Barutciski agreed that developing countries have been becoming more frequent users of trade remedies, particularly anti-dumping provisions, "most notably against each other." For example, compared to 15 EU and 29 U.S anti-dumping cases in 2002/03, the official record shows 67 originating in India, 14 in Thailand, 12 in Turkey, 11 in Korea, eight in Peru, and six in Indonesia. Over the past five years, the "overwhelming majority" of anti-dumping cases were launched in larger developing countries, and the overwhelming majority of those were against other developing countries.

Barutciski sees a risk that developing countries will gradually acquire the same problems that have emerged in the industrialized countries, where whole industrial sectors have become quite dependent on these instruments—trade protection can be a habit that is hard to break.

In this regard, Barutciski described Cancún as a "dismal failure" for having squandered the opportunity to address disciplines on anti-dumping which, after decades of trying, the world community had finally succeeded in persuading the US to put on the table. For the industrialized North, trade with the South is essentially a side-show; not so for the South. That simple reality underscores the importance of the rules-based system, even if the rules are not ideal. The fundamental lesson for Barutciski is that it does no developing country any good to turn its back on a rules-based trading system, which "unfortunately is what I think happened in Cancún."

Costs and benefits of the WTO Agreement on Subsidies and Countervailing Measures

As the last presenter of the day, **Diana Tussie** of the Latin American Trade Network assessed the benefits and costs for developing countries of the WTO Agreement on Subsidies and Countervailing Measures.

The benefits of the Agreement, in Tussie's view, include greater transparency, disciplines on the use of countervail, and the emergence of a more level playing field in trade as some of the more "hyperactive" exporters have been constrained which has worked to support some of the slower starters that "do not have big pockets." Costs are manifest in less freedom of action for developing countries: the Agreement introduced a standstill on use of export subsidies for industrial goods by developing countries, with a commitment to phase them out by 2005.[18]

Some room to manoeuvre is built into the Agreement since subsidies are permitted under specified conditions:

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[18] Editors' note: The WTO Agreement on Subsidies and Countervailing measures included special and differential measures for developing countries in respect of export subsidies other than those permitted under the Agreement on Agriculture. Export subsidies were prohibited for developed countries; for developing countries, the provisions included a commitment not to expand their export subsidies, with a commitment to phase out existing subsidies within 5 years of the Agreement coming into force (8 years for the least developed), with the possibility of a two-year extension with the approval of the WTO Committee on Subsidies and Countervailing Measures. The phase-in period thus ends in 2005. The phase-in periods were subject to two trigger points for graduation to more rapid timetables for eliminating export subsidies, if a country achieved a stipulated level of per capita GDP or was deemed to have reached a threshold of export competitiveness based on its holding of a 3.25 per cent share of world trade for two consecutive years.

(a) to support industry by equalizing competitive conditions across countries;
(b) to provide moderate subsidies for small-scale exporters under the *de minimus* clause; and
(c) to provide horizontal (non specific) support to industries for research and development, assistance to disadvantaged regions, environmental upgrading, and labour training.

As well, rules still provide room for discretionary policies—and that is where trade disputes can arise. National governments retain the authority to decide on the eligibility of applicants for trade relief through CVD proceedings, and to establish the definitions for domestic industry and of "like products" for CVD investigations. They also exercise discretion in calculating the margin of dumping, in choosing among nine indicators to determine "injury", and in deciding whether to enact measures of protection.

Should developing countries press for the renegotiation of the Agreement on Subsidies and Countervailing Duties? While it might appear worthwhile to renegotiate agreements that have a built-in bias against developing countries, Tussie warned against losing ground elsewhere and touching off a "race to the bottom". She called the chance of positive returns from such a renegotiation "uncertain". Addressing the development dimension may be more a matter of fully taking advantage of existing policy flexibility. She suggested negotiating for extended compliance deadlines, for example. She held out little hope for any initiative to tighten current provisions for trade relief. Indeed, in discussion, the possibility was raised that the WTO-plus safeguards negotiated in China's accession agreement might become the new "weapons of choice" on the world stage.

Closing Remarks

Professor Hana'a Kheir-El Din of Cairo University closed the seminar by thanking IDRC, DFAIT and all the participants. She emphasized the importance of the following issues for the research agenda on trade and development:

- The role of domestic political pressure in challenging trade-distorting policies.

- The impacts of different trade policy options on developing countries.
- The concept of differential tariff treatment for countries with weaker institutional capacity.
- The need to integrate development considerations into trade policy.
- Ways of enabling the poorest countries to reap the benefits of trade liberalization.
- The WTO's own governance, procedures, and transparency.

Summary and Conclusions

This seminar on the development aspects of the world trade system occurred at a somewhat anxious and introspective moment in international trade policy history. The collapse of WTO talks at Cancún had left the multilateral negotiations in a state of limbo and trade practitioners and experts immersed in self-doubt. Such moments can be fertile in terms of questioning assumed understandings and charting future directions. The seminar succeeded rather well in reflecting the two poles of thinking about international trade policy from the development perspective, one pervasively pessimistic in outlook, the other sceptical but constructively engaged in the minutiae of negotiations and policy interventions.

On the one hand, the presentations suggested not only that the costs of accession may be higher and the domestic implementation of commitments more demanding than governments anticipate but also that the realisation of gains depends on overcoming a series of further obstacles, mostly to do with non-tariff market entry conditions and trade remedies. All this is quite apart from the issue of supply constraints in developing countries and the endless battles for market share, revenue growth, productivity improvements and product innovation which are the focus of the trade promotion literature and the main source of concern to the least developed countries.

On the other hand, some of the presentations demonstrated that careful, detailed research on alternative measures to address particular problems can lay the basis for constructive engagement within the multilateral system. The research effort needs to be locally generated and controlled, if its outputs are to be taken up into policy debates within developing countries.

Product standards are a case in point. From the development perspective there was a strong perception that product standards represent a new kind of protectionism. This perception does indeed find some validation in research explicitly undertaken to investigate this hypothesis. Product standards are indeed proliferating. They vary by destination market, with the most important destination markets often having the most demanding standards as well as costly and at time damaging testing procedures. And they seem to evolve continually, which creates revenue-diverting burdens on developing countries forced to adjust. Moreover, they mimic the effects of tariff escalation and tend to favour large over small producers as suppliers. From these perspectives, product standards operate in ways that increase the difficulty of achieving some important development goals. But the research also argues that standards are in many respects legitimate, suggests how the process of standard setting could be improved, and argues that WTO mechanisms can be used to correct trade-impeding inconsistencies.

The seminar also showed that, whatever the background level of disaffection with the trade system, many developing countries are aggressively pursuing their interests within the WTO in two ways.

First, they are exploiting established policy flexibility and trade remedy procedures. The fact that several large and middle income countries are aggressively starting to use WTO trade remedy measures has forced the traditional users of these measures—the developed countries—to acknowledge the possibility that improved disciplines might indeed be needed to ensure that they do not unduly limit the gains from trade.

Second, they are building more breadth and depth in their negotiating strategies, in at least two dimensions:

(a) At the national level, policy positions are increasingly based on interests articulated in collaboration with national stakeholders and informed by credible (which equates to locally conducted and owned) evidence-based research. The capacities of NGOs in trade research, trade policy dialogue/influencing, information dissemination and capacity building in developing countries are receiving greater recognition in these regards, although much still needs to be done to improve communication and information exchange amongst stakeholders in developing countries to ensure more comprehensive support to policymaking.

(b) At the international level, they are effectively building alliances to increase their negotiating leverage. In this regard, even the largest and most dynamic developing countries (especially China, India and Brazil and perhaps South Africa), which have well developed capacities for diplomacy, research and internal policymaking and the negotiating leverage afforded by large and growing market size, are challenged to "punch to their weight" as individual WTO Members. It was these countries' decision to join in defence of their common interests in the WTO negotiations that produced first the impasse in Cancún but then also later moved the negotiations forward. The consensus reached in July 2004 is surely also testament to their effectiveness as intermediaries of a kind, championing the cause of development no less than their own prosperity and apparently persuading smaller, poorer countries not to exercise their veto power within the institution.

The seminar left open many questions facing the research community at large and policymakers within these poorer countries: How are developing country and especially least developing country interests to be best advanced, inside the WTO or in other trading structures? Under what conditions will they really stand to gain from increased participation in international trade? What domestic measures are required to ensure that increased trade helps to reduce poverty and deprivation? How can the pursuit of economic growth be reconciled with those of social welfare and environmental sustainability?

Developing countries are "voting with their feet" to join the WTO. This shows awareness of the need for an orderly and universally accepted system of trade rules to ensure continued benefit for themselves from trade. At the same time, the terms of their engagement in the WTO are changing. The July 2004 agreement on a framework for further negotiations reflected the increased traction that developing country positions have gained within the WTO. This is a hopeful sign that there is serious concern on all sides not only about remaining imbalances in market access but also about flaws in the current set of rules, together with a presumption that corrections can indeed be arrived at collectively.

Documents from the Seminar

Biographical notes, papers and slide presentations of seminar presenters are available at *http://web.idrc.ca/en/ev-51063-201-1-DO_TOPIC.html*, including:

Mohsen Helal: The Challenges of WTO Accession to Middle Eastern Countries (slides)

Miguel Lengyel: Implementing Uruguay Round Agreements (slides)

Robert Wolfe: Reform Proposals for the WTO

John Toye: The World Trade System: Challenges and Opportunities from a Development Perspective (slides)

Biswajit Dhar: Agriculture Negotiations from a Developing Country Perspective (slides)

Pedro da Motta Veiga (not present at the seminar): The Development Issue in the Trade Agenda: Lessons from On-going Negotiations (slides)

Dominique Njinkeu: Negotiating en bloc: Challenges for the African Group in the WTO (slides)

Kamala Dawar: How NGOs Engage in Multilateral Trade Talks (slides)

Simon Evenett: Stakeholder Relationships and Knowledge Gaps: The Case of the Singapore Issues (slides)

Veena Jha: Standards and Trade: Background/Results of the (IDRC) Project (slides)

Jason Potts: Deepening Participation in Global Trade Governance Through Standards Development and Implementation: The Case of Coffee (slides)

Miguel Lengyel: Labour Standards and Trade Negotiations: A View from Latin America (slides)

Peter Draper: Facing Trade Defence Instruments: The South African Case (slides)

Diana Tussie: Disciplines on Subsidies and Trade Relief (slides)

Building Capacity for Development through Trade: Perspectives from APEC

Pierre Sauvé[*]

On February 25-26 2004, the APEC Capacity Building Group (CBG) held a two-day workshop in Santiago, Chile, on "Best Practices in WTO Capacity Building". The workshop, which was sponsored by the Government of Canada in collaboration with the APEC Secretariat, brought together a diverse set of donors and recipients of trade-related technical assistance and capacity-building to exchange views on how best to deliver and to utilize capacity building assistance in the trade field. This Chapter highlights the key insights emerging from the two days of discussions and suggests directions for future work.

Introduction

With increased awareness of the relevance of trade for development, bilateral and multilateral agencies have begun to mobilize significant resources to support trade-related technical assistance and capacity building (TRTA/CB) in developing countries. In a relatively short time span, TRTA/CB has become one of the fastest growing areas of development assistance, fuelled by the significant capacity enhancement commitments made in the context of the World Trade Organization's (WTO) Doha Development Agenda (DDA) and the accelerating pace of regional and bilateral trade talks, many of which also feature an important TRTA/CB component.

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[*] The author is Visiting Professor, Institut d'Etudes Politiques de Paris; pisauve@hotmail.com. Thanks are due to Christopher Burton for his numerous contributions to the workshop at which the papers covered in this report were presented. This Chapter is based on a report prepared by the author for the APEC Capacity Building Group; the views expressed here do not necessarily represent the views of the Department of International Trade or the Government of Canada.

Capacity building today is among the key foundations on which consensual support for the pursuit of new market opening and rule-making initiatives in the trade field rests. Donor countries have a major stake in supporting the trade-related capacities of developing countries. It is in their mutual interest to help developing countries overcome trade capacity gaps, negotiate effectively and credibly, implement trade agreements, and honour their contractual obligations under them. Absent such developments, many developing countries might lose faith in the benefits of open market policies, be shackled by a low capacity to sustain imports and, above all, remain dependent on foreign aid for their development (OECD, 2001).

Given the magnitude of needs in developing countries, the multiplicity of trade talks under way, the increasing breadth and technical complexity of issues covered, and the limited funds available for assistance, it is crucial that available resources be effectively utilized to deliver credible trade-related assistance to recipient countries. The issue addressed here is not the need for a significant increase in "aid for trade" (which is taken as given), but rather how best to deliver such assistance.

The need for a more rigorous discussion of TRTA/CB's most challenging aspects has arguably become more pressing in the wake of the Cancún Ministerial, whose disappointing outcome brought home the reality that reinvigoration and successful completion of the DDA will require more (and more effective) efforts at building capacity for trade alongside meaningful forward movement on market access and on the rules governing international commerce.

This Chapter is structured around six core themes, each one of which forms a key link in the TRTA/CB chain. Addressing issues along such a continuum draws useful attention to the need for donors and recipients alike to take a comprehensive approach to the range of TRTA/CB issues likely to arise over the course of the trade policy/negotiating cycle. The six themes are:

(i) assessing and prioritizing TRTA/CB needs;

(ii) integrating TRTA/CB into an economy's development strategy, with particular attention paid to the TRTA/CB challenges arising in the context of WTO accession;

(iii) enhancing donor coordination;

(iv) identifying best practices for building trade policy *formulation* capacity;

(v) identifying best practices for improving post-negotiation and accession *implementation* capacity; and

(vi) identifying best practices in *evaluation* of TRTA/CB projects.

Three elements critical to the realization of benefits from TRTA/CB are touched on only in passing:

(i) enhanced access to markets, without which building capacity for trade is of limited value (indeed, the maintenance of trade barriers will typically retard the development of trade capacity);

(ii) trade development (e.g., increasing an economy's ability to supply world markets and thus to take advantage of enhanced market access opportunities) and

(iii) infrastructure for trade, including both physical (e.g., roads, ports, logistics services) and institutional (e.g., customs administration, product standards) elements.

While formally absent from the workshop program on which this Chapter is based, these three elements were given high prominence in the workshop presentations and ensuing discussions. This illustrates once more the need for a holistic approach to TRTA/CB if it is to fulfill its development promise.

Background

Trade as a means towards developmental ends

The welfare gains that empirical analysis indicates will likely flow from further trade and investment liberalization are typically impressive enough to warrant collective action responses. The multiplicity of trade liberalization initiatives currently being pursued at the bilateral, regional and multilateral levels attests to the growing acceptance worldwide that integration into world markets is likely, on balance, to be beneficial to an economy's long-term growth and development prospects. Yet, following a decade in which trade liberalization might have at times been pursued almost as an end in itself, perhaps taking for granted its centrality to a long-term, pro-poor, development agenda, there is today much empirical evidence suggesting that the gains from market opening cannot be reaped automatically; that improved market access, while indispensable, may not be enough to stimulate diversification and trade-led growth; and that increased trade cannot be expected, on its own, to contribute to reducing poverty and achieving the other Millennium Development Goals agreed upon by the international community. For developing countries to maximize the benefits from trade liberalization, the evidence suggests that market access must be complemented both by domestic policy reforms and by trade capacity building.

What do we mean by capacity building?

The question naturally arises of what one means by capacity. Simply stated, the concept of "capacity" can be defined as the ability to perform functions, anticipate and solve problems, and set and achieve objectives (UNDP, 2002; UNCTAD, 2003). Applied to trade, and following the guidelines adopted by members of the OECD's Development Assistance Committee (OECD, 2001), capacity building relates to the means of enhancing the ability of policymakers, enterprises and civil society in developing economies to:

(i) *collaborate in formulating and implementing a trade development strategy embedded in a broader national development strategy*. For this to occur, countries need to establish a trade policy process with broad stakeholder participation that can set agendas and identify clear objectives. Simply put, countries must formulate a vision of the role that trade can (and cannot) play alongside other policies in pursuing a longer-term development agenda;

(ii) *participate in – and benefit from – the institutions, negotiations and processes that shape national trade policy and the rules and practices of international trade*. This involves empowering countries at the individual, institutional and societal levels to become more active players in the WTO and other trade negotiating forums so as to promote their own trade interests. Simply put, countries must endogenize the knowledge, skills and analytical and policy reflexes required to navigate the choppy waters of international economic governance; and

(iii) *increase the volume and value-added of exports, diversify export products and markets and increase foreign investment to generate jobs and exports.* That is, durably to enhance a country's supply response by enhancing both the trade hardware (including physical infrastructure) and software (information, supportive policies, institutions) required for private actors to seize the commercial opportunities opened up by trade agreements and for governments to do a better job of assisting them.

Signs of progress

Despite the sense of immobility, controversy and political blockage that permeates much of the public discussion of international trade, a great deal has been achieved in recent years in heeding the call for greater and more targeted forms of TRTA/CB. Most donors and trade capacity building agencies (both bilateral and multilateral) have substantially scaled up the quantity and financial value of their TRTA/CB activities. Donors have also contributed to various multilateral funds, such as the DDA Global Trust Fund, the Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries (IF) and the Joint Integrated Technical Assistance Program (JITAP). The WTO and the OECD have teamed up to create a joint database to monitor support for, and better coordinate, trade capacity building projects pursued under the DDA and the Millennium Development Goals.

Tangible progress has also been made in raising awareness within the development community of the importance of trade for development and poverty alleviation. Accordingly, a large number of OECD countries now have a dedicated strategy in place to expand their TRTA/CB activities. And multilateral institutions such as UNCTAD and ITC, as well as development banks and financial institutions active at the regional and multilateral levels (e.g. the International Monetary Fund, the World Bank, the Asian Development Bank, the Inter-American Development Bank, etc.), have all stepped up their efforts and developed new programs and funding instruments to meet the growing demand for capacity enhancement.

Much of this activity involves "learning by doing" within and between the trade and development communities, with the inevitable shortcomings in initial approaches remedied through subsequent adjustments in the nature, design and/or modes of delivery of various capacity-building instruments.

Double mainstreaming: still some way to go

If efforts deployed in recent years to meet TRTA/CB challenges have been unprecedented in the history of the multilateral trading system, such a ratcheting up in TRTA/CB supply has met with an equally high demand. The question arises, naturally, whether such supply and demand are meeting at a point of equilibrium and, if so, whether this equilibrium can be sustained over time.

Much as calls for mainstreaming trade into the development process have led to undeniable progress, the same cannot as readily be said of mainstreaming development considerations into the *practice* of trade policy: that is to say, the world's leading development agencies have arguably done a better job of building up internal trade policy capacity and awareness than trade ministries have in embedding development considerations into the *modus operandi* of international trade negotiations. This is evidenced, for instance, in the tepid advances made to date under the DDA (and in regional discussions) on a number of pro-poor rule-making and market access issues such as agricultural market access or the movement of service providers (the so-called "mode 4" of trade in services). It is also evidenced in the inadequate nature of responses made to date to calls for addressing in a comprehensive manner the genuine implementation challenges flowing from various Uruguay Round commitments. And it is evidenced in the protracted state of discussions of how best to provide special and differential treatment in trade rule-making (an issue area in which developing country attitudes have, however, also served to obstruct progress).

Further evidence of the difficulties encountered in mainstreaming developmental considerations into trade policy making can be found in the WTO accession process. Despite the adoption in December 2002 of guidelines targeted specifically at the accession needs and challenges faced by the least developed countries, the latter continue to face, in the context of a highly asymmetric negotiating environment, strong pressures to undertake high, and often WTO-plus, levels of entry commitments (Sauvé, 2004).

The above discussion highlights a tension that lies at the heart of the mainstreaming debate and stems from the fact that the trade and development communities still do not always share the same views about trade-related assistance or more generally about the relationship (and implied causality) between trade and development. The trade side often appears to be more concerned about the immediate, shorter-term challenge of effective participation of developing countries in trade negotiations, about their successful completion, as well the post-negotiation compliance record of developing countries. Technical assistance targeted more narrowly at trade ministry staff and officials in sectoral ministries responsible for negotiations and implementation is typically seen as the main tool to secure such objectives. Simply put, the trade side may be characterized as predominantly interested in the w*hat* and *how* of negotiations and the implementation of negotiated outcomes.

The development side for its part tends to be primarily concerned with realizing the positive longer-term effects of changes in trade policy on issues such as economic growth, sustainable development, poverty reduction and gender-based discrimination. A wide range of capacity-building instruments will typically be appropriate to such tasks, targeted at an equally large set of institutions and domestic stakeholders. Technical assistance will not necessarily be the best tool, as this will depend on whether the developing economy can: meaningfully contribute to setting the agenda (which will not usually be the case in the context of WTO accession); secure expanded access for goods and services for which it might have export interests; and/or develop the supply capacity, including meeting requisite product standards, to serve export markets.

While obviously concerned by the *what* and *how* of the trade agenda (i.e., by the centrally important negotiation and implementation dimensions of capacity-building), the development community is also naturally concerned by the *why* and *what else* of the trade negotiating process. This in turn means that greater attention is often paid in development than in trade circles to the issues of needs assessment and prioritization (i.e., assessing the gains from trade relative to those flowing from addressing other pressing development challenges) and of integrating TRTA/CB into a national development strategy.

There is little doubt that more needs to be done to secure a genuine process of double mainstreaming within the trade and development communities. A genuine mainstreaming of development into trade needs to go beyond the usual approach of special and differential treatment and transitional measures for implementing individual agreements (even as much as such measures are essential given the increasing diversity of the WTO's membership and as evidenced by the protracted debate over the implementation legacy of the Uruguay Round). Such mainstreaming needs to be reflected in how the trade agenda is set, in the design of substantive rules for trade, especially in new areas, as well as in performing a development audit of agreed rules, preferably before these are implemented.

For all of the above to occur, developing countries and the development constituency (including civil society organizations) in donor countries needs to bolster its influence in agenda setting and trade rule making. One illustration of a positive step in this direction was the Doha Declaration on access to essential medicines. Moreover, just as trade agreements are increasingly reviewed on environmental grounds, so too should they be assessed through a developmental prism. This in turn implies that the trade and development communities join forces in developing a consensual methodological framework to carry out such assessments. Priority attention could be given in this regard to WTO-acceding countries, particularly the least developed countries.

Mainstreaming trade into development is much broader than increasing budgets for TRTA/CB. A lot remains to be done to ensure that trade aspects are taken on board in general development discussions such as those related to the Poverty Reduction Strategy Process (PRSP). The WTO's Trade Policy Review Mechanism (TPRM) could prove helpful in improving the linkage between PRSP and trade policy discussions. However, in order to do so, the trade policy reviews of developing and least developed countries would need to become more regular.

Key challenges in TRTA/CB

Aside from the need to do a better job at double mainstreaming, trade and development officials face a number of other important challenges in realizing the benefits of TRTA/CB activities. That many of these challenges are familiar to practitioners in the field does not lessen their importance as potential obstacles to finding a proper balance between a donor country's own trade policy agenda and the recipient county's needs and between the provision of short-term negotiating capacity-building and support for longer-term development activities. Eleven such challenges can be discerned:

(i) The challenge of *coordination and coherence* – ensuring that the main actors involved in the delivery and receipt of TRTA/CB have broadly convergent priorities, operating arrangements and timeframes and that the delivery of TRTA/CB corresponds to a clear division of labour among various agencies, based on their comparative advantages.

(ii) The challenge of *context specificity* – ensuring that the design of TRTA/CB responds to needs identified by recipients rather than to the market access agenda of donor countries (so-called "supply-driven TRTA/CB").

(iii) The challenge of *neutrality* – ensuring that dispensers of TRTA/CB hailing from (or funded by) multilateral and regional organizations provide objective advice tailored to the specific development realities of recipient countries rather than to the ideological or political interests or preferences of dispensing agencies. One means of promoting neutrality would be to encourage bilateral donors to manage their TRTA/CB trust funds on an untied aid basis.

(iv) The challenge of *diversity* – while avoiding costly duplication, ensuring that recipient countries have access to a diversity of views on alternative policy choices through exposure to the views and analysis of researchers in academia, independent think tanks, training institutes, civil society organizations and the private sector. The more that such advice is "home grown" or based on the experience of regional partners, the greater the likelihood that it will be responsive to context specificity. Untying trust fund-supplied

TRTA might be one means of lessening the scope for "advice-shopping" on the part of recipient.

(v) The challenge of *sustainability* – ensuring that the people, knowledge and skills required to develop and implement a pro-poor national trade strategy remains when donors wind down assistance projects or change funding priorities.

(vi) The challenge of *regional leveraging* – ensuring whenever feasible that the resources and expertise of regional integration institutions and policy research networks are leveraged for purposes of promoting greater context specificity and realizing economies of scale and scope in TRTA/CB delivery.

(vii) The challenge of *absorptive capacity* – ensuring that the supply of TRTA/CB is broadly consonant with recipient countries' administrative capacity to absorb such assistance and the overall relevance/priority of TRTA/CB projects for recipients. In particular, care must be taken not to overload administrative agencies in developing countries with complicated procedural and reporting requirements.

(viii) The challenge of *ownership*: ensuring that developing countries take the lead in defining their needs and articulating a proper sequence of trade capacity building projects over the entire course of the trade negotiating and implementation cycle.

(ix) The challenge of *complementarity* – ensuring that social, fiscal, infrastructure and private sector development policies are aligned and sequenced in a complimentary fashion alongside trade and investment liberalization. The challenge of *complementarity* - ensuring that social, fiscal, infrastructure and private sector development policies are aligned and sequenced in a complimentary fashion alongside trade and investment liberalization.

(x) The challenge of *comprehensiveness* – ensuring that TRTA/CB is designed to assist developing countries at each stage of the trade policy cycle, taking due account of the fact that TRTA/CB needs will tend to differ, , both over time as new issues and policy priorities emerge and across countries at different levels of economic and institutional development.

(xi) The challenge of *managing expectations* – ensuring that recipient countries are clear on what trade liberalization and trade rules can and cannot do in addressing longer-term development issues, and assigning policy objectives to the most appropriate set of policy instruments.

Getting to why: needs assessment, prioritization and trade policy formulation

Needs identification is one of the greatest challenges facing developing economies with limited trade policy capacity. Paradoxically, a certain level of trade policy capacity is needed in order to identify where capacity must be improved. Moreover, the needs of economies, and the most appropriate TRTA/CB response, will vary depending on economies' levels of development and integration into regional or world markets.

Once needs have been identified, prioritizing them in the face of scarce resources and shifting international negotiating priorities represents an added challenge. Priority needs must then be matched with the assistance available from donors, who have their own priorities, constraints, and preferences.

Because the trade policy cycle naturally starts with TRTA/CB needs assessment, close interaction with donors and agencies that have extensive field presence in recipient countries assumes particular importance. This means, in practical terms, that institutions such as UNDP, the World Bank, regional development banks, as well as individual donors from OECD countries, might be comparatively better placed than Geneva-based organizations or donor country trade ministries to provide the forms of TRTA/CB required to launch the trade policy cycle and to situate trade in a broader development framework.

Developing a vision of trade's contribution to development

Despite the challenges noted above, there is simply no escaping the fact that, in order to fully participate in trade negotiations, developing economies must identify their offensive and defensive interests, build domestic consensus in favour of the resulting positions, and identify allies and acceptable trade-offs in the broader negotiating environment. The record suggests that no economy has achieved substantial gains in trade without an effective trade policy framework. Economies must decide for themselves what role they see trade playing in their development paths. They must then acquire the institutional capacity to translate this vision into bargaining positions in trade negotiations and into policies designed to capture benefits from the opportunities opened up by such negotiations as well as to attenuate inevitable downside risks.

Identifying and prioritizing the trade policy needs of economies has become considerably more challenging in recent years given the broadening scope of the trade agenda and the fact that the multilateral trading system today operates on the basis of a single undertaking. This implies that WTO members at all levels of development have a stake in, and need to devote negotiating attention and implementation resources to *all* of the WTO multilateral agreements, despite the fact that not all have equal developmental relevance (Barrett, 2004).

This challenge is particularly daunting for the world's poorest countries, several of which are currently candidates for WTO accession and must also contend with calls from trading partners, both in the context of the DDA and in an ever-growing number of bilateral and regional negotiations, to broaden yet further the trading system's substantive remit to a range of new trade-related issues arising from globalization.

Promoting a whole-of-government position

Gaining support for a trade policy vision involves not only determined efforts to reach out to key stakeholders, but also close inter-departmental coordination. The dividends from such efforts will be felt both in the conduct of negotiations, as trade officials increasingly need to team up with officials from line ministries and regulatory agencies to carry out their tasks competently (and in sync with the regulatory or developmental realities of their countries), as well as in the implementation phase that follows, given the attendant changes to national laws and regulations that trade agreements often entail.

Line ministries often appear to be where the deficiency is greatest in terms of the understanding of trade-related commitments and rules and their implications for domestic sectoral development programs. Failure to reach out to them can breed suspicion and policy precaution that may ultimately undermine an economy's negotiating strategy. Also important in recipient countries is the need for regular and structured dialogue between trade and development ministries, both of which might have their own separate channels of communication with key donors and institutions involved in TRTA/CB activities. Strengthening the latter dialogue may be particularly important at the needs assessment phase, so as to be clear on a long-term blueprint of capacity enhancement and thus to avoid the traps of needless duplication and supply-driven TRTA/CB projects (Songco, 2004).

Effective intra-governmental coordination depends in the first instance on the flow of information that is relevant to the conduct of negotiations and that should inform national positions (offensive or defensive) between the various ministries concerned and with subsidiary levels of government (sub-national, local, municipal). It is also important that those responsible for implementing and enforcing outcomes be at the negotiating table.

The crucial importance of stakeholder participation

Today's trade agenda, much of which has moved "behind the border", involves not only trade policy specialists but also a multiplicity of stakeholders, including a large and growing number of officials in sectoral ministries, regulatory agencies and sub-national levels of government, business, civil society, and parliamentarians. Because trade policy impacts virtually all facets of public policy, it is essential that an economy's trade policy strategy—it's vision for trade—rest upon an ongoing process of local participation and consultation among key stakeholders, within governments, and across regions.

Many economies have learned over the years how to do this effectively, by setting up channels of continuous, two-way, dialogue with core trade- and development-related constituencies. Such communication channels afford an economy numerous benefits: they can help it to more readily identify its offensive and defensive interests in negotiations; gauge the level of political support for reform proposals; determine optimal sequencing strategies; identify and anticipate the distributional consequences of various policy choices; encourage a dialogue on the costs and benefits of alternative policy and negotiating strategies; and, critically, detect implementation and/or supply-side bottlenecks early on, which in turn allows reflection of TRTA/CB needs in the trade negotiations at the outset of rather than (too) late in the process. Getting this sequence right may be critical to generating early "winners" from market opening, a key ingredient for sustaining broad-based support for a longer-term commitment to policy reform.

Endogenizing trade-related analytical capacity

Nurturing and sustaining local (and regional) research networks linking universities, local think tanks and research institutes and other non-governmental bodies can be indispensable in addressing the challenges of ownership, sustainability and context specificity noted earlier. This cannot of course be done overnight; experience shows that care must be taken in securing longer-term funding for such networks, without which many might simply not be sustained owing to a dearth of domestic or regional resources for policy research. As the examples given in Box 1 below suggest, the trade and development payoffs from targeting such activities though TRTA/CB at both the national and regional levels are likely to be significant.

Box 1. Investing in local research capacity: World Bank initiatives

An example of a successful program that combined research capacity support, and training is the World Bank's assistance program to China's WTO accession during the last five years, with support from the Italian government. The Bank relied heavily on local partner institutions to deliver training and made extensive use of distance learning to reach the country's Western provinces. More than 1,800 officials, managers, and academics were trained in 16 face-to-face and distance learning courses at the national and provincial levels. In parallel, the Bank's research unit worked with local universities and other partners on a sustained research project on "WTO Accession, Policy Reform, and Poverty Reduction in China", whose large output is publicly available on the web. Chinese economists were closely involved in both the Bank research work and the parallel World Bank Institute (WBI) training program. Today, these researchers are able to produce high quality papers independently and present them in international conferences and WBI seminars. By working with local researchers and "training the trainers". , the Bank is of the view that its program contributed to building a cadre of highly qualified trade researchers, advisors, and trainers and, indirectly but effectively through these channels, to China's success in managing WTO accession and its integration in the world economy.

WBI and the Bank's trade research unit have also been jointly pursuing a long-term program, with support from the U.K. and the Netherlands, to enhance the quality and policy relevance of developing country researchers' trade-related work and to strengthen their links with policy makers. The main beneficiaries for the past three years have been two African research networks *(AERC and SATRN)* and leading Chinese universities; support has also been extended to research networks in Latin America, the Middle-East and North Africa, South Asia, and recently to the ASEAN region.

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A third example concerns support for countries in the South-East Asia region engaging in negotiations on trade in services within ASEAN, between ASEAN and other Asian nations, and in the Doha round. At the request of the Chairman of the ASEAN Senior Economic Officials Meeting, WBI has been supporting since mid-2003 the capacity of a group of local trade researchers and advisers--the ASEAN Economic Forum (AEF)--to analyze the implications of different liberalization strategies. Current research seeks to gain an understanding of the main barriers affecting services providers from within and outside the region; assessing the benefits and costs of opening service markets to greater foreign competition; and identifying areas for international engagement at the regional and multilateral level.

Source: Zanini (2004)

Dealing with what and how: building capacity to negotiate and implement trade agreements

The agreements emerging from the Uruguay Round, forming as they do a single undertaking, resulted in developing countries undertaking a broad set of obligations to developing countries that went well beyond the traditional border measures of the old GATT, and accepting disciplines with a far wider development impact. While there is little denying that in recent years TRTA/CB has done a better job of bringing a number of developing countries to the point at which they are ready and able to formulate a national trade strategy and advance it in negotiations, this does not necessarily imply that they are prepared to implement the resulting trade agreements. Nor does it guarantee the availability of resources to handle the potentially significant recurring costs that new trade rules typically bring in their wake (e.g. the need to set up or to strengthen regulatory agencies following service sector liberalization or to enforce expanded intellectual property protection). The administrative and financial burden of complying with WTO obligations tends to be especially acute for WTO acceding countries, particularly the least developed countries, as it is almost certain to involve far-reaching commitments to substantive law reform, institutional reform and judicial review (Mitchell, 2004).

Moreover, the cost of implementing WTO agreements is not just associated with legal compliance. The "thick end of the wedge" comprises of the ancillary measures and costs to *effectively* implement the agreements as well as the various ancillary, supporting measures necessary to realize the potential benefits from liberalization. Such costs and capacity building requirements will be diverse and will vary according to the domestic circumstances and in a resource constrained environment will need to be assessed against competing (and at times developmentally more compelling) domestic priorities (Finger and Schuler, 2001; Prowse, 2002).

However, the returns to effective negotiation and implementation might be sufficiently high to warrant developing economies borrowing from multilateral development banks to finance their capacity building efforts. This issue has taken on greater salience of late given declining volumes of grant money available for TRTA/CB purposes. Indeed, many developing countries have come to the view that it may be a better strategy to take on small reimbursable loans to tackle pressing capacity building challenges in a comprehensive way, rather than pursuing a piecemeal approach and holding out for grants and risking loss of valuable time in preparing for trade negotiations or in dealing with their implementation consequences.

International financial institutions (at both the regional and multilateral level) have recently stepped up lending activities and programs designed to help borrowing countries prepare for negotiations and for the structural adjustments consequent to reciprocal liberalization (including, in some cases, for the loss of traditional trade preferences). While such assistance can be important in helping developing countries deal with the adverse consequences of market opening, questions remain as regards the optimal terms of lending for TRTA/CB purposes. Borrowing might be most appropriate with regard to trade promotion and private sector support activities aimed at enhancing a trade supply response concessional assistance would appear better suited to longer-term efforts at training officials, supporting research networks and strengthening domestic and regional trade and regulatory institutions.

Box 2. UNCTAD's "best practices" for WTO-related capacity building

- Support the proactive positions of developing country negotiators.
- Ensure demand-driven and tailor-made assistance matching the specific needs of beneficiaries; no "one-size-fits all" operations.
- Cooperate with international, regional and national institutions in order to provide various views.
- Evaluate impacts by using qualitative and quantitative benchmarks.
- Be flexible in adapting the modalities of assistance, and target short-term as well as long-term needs according to the goals pursued by each operation.

Source: Tortora (2004)

Outstanding TRTA/CB challenges: supply capacity, donor coordination and evaluation

Enhancing the capacity to supply foreign markets

To take advantage of market opening abroad, developing countries typically need to diversify their product lines, increase the value added in their production chains, tailor their products for export markets (including by raising quality standards to meet certification requirements abroad), improve trade-related infrastructure (notably transportation systems and logistics services), and simplify customs procedures.

Governments, the private sector and development partners have to invent new ways of working together to foster competitive supply responses. Experience shows that important trade performance payoffs can result from targeting development assistance towards intermediary (so-called "meso-level") institutions and processes, such as private sector associations, SME support structures and public-private dialogue. Box 3 below describes an example of good practice in this area that can be looked upon both as a vehicle for trade-related capacity building itself as well as a model for trade-focused activities.

Box 3. The Mekong Private Sector Development Facility (MPDF)

The MPDF is a multi-donor program managed by the International Finance Corporation. It promotes private sector development in Cambodia, Vietnam, and Lao PDR, by providing technical assistance to local small and medium-sized enterprises (SMEs) obtaini project financing:, by providing technical assistance to intermediary organizations that deliver essential services to SMEs, and by supporting public private policy dialogue mechanisms.

The MPDF has, among other things, recently launched the Business Associations Support Initiative (BASI) in Vietnam. This locally-driven project aims to improve the capacity of business associations through management training, assisting with strategic actions plans, and promoting linkages with counterpart organizations in other countries.

Source: Zanini (2004a).

Strengthening donor coordination

Given the wide range of issues encountered in building trade capacity and the scope of associated reforms needed by developing countries, no single agency has either the competence or the resources to undertake the work alone. This underscores the need for collaboration between bilateral donors, for coherence and appropriate sequencing in policies promoted by the main multilateral providers of trade assistance, and for the building of a broad-based constituency for trade reform in developing countries.[1]

The provision of TRTA/CB involves an alphabet soup of players at the national, bilateral, regional and multilateral levels. This multiplicity of actors raises three sets of issues. First, different donors have different comparative advantages in terms of trade and/or development experience, resources and objectivity. Second, coordinating assistance from different sources is challenging for recipients and donors alike. Third, TRTA/CB needs to be coordinated with assistance programs in other areas such as economic stability, regulatory cooperation and poverty alleviation. With effective coordination, however, TRTA/CB assistance to a given economy can generate synergies such that the overall impact will be greater than the sum of benefits from individual projects.

Effective coordination is hampered by various factors: the continued overall scarcity of resources; the decline in grant money; inter-agency differences in institutional and policy cultures; competing national interests; and the inherent difficulty of divorcing a donor country's TRTA/CB from its own market access interests. There is also a sense that coordination efforts have been somewhat haphazard with key players providing sporadic bursts of responses to needs perceived at any particular moment (Rolian, 2004).

A useful distinction can be drawn between: (i) coordination among providers of the same type of TRTA/CB (e.g., in the area of trade in services, as between the WTO, UNCTAD or the

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[1] The DDA places particular emphasis on TRTA/CB coordination: (i) at the national level in beneficiary economies; (ii) at the inter-agency level; and (iii) at the international level, among bilateral donors through mechanisms established between the WTO and the OECD's Development Assistance Committee (DAC).

World Bank), and (ii) coordination among providers of different types of TRTA/CB (e.g., enhancing negotiating capacities vs. improving the supply-responsiveness of countries). While coordination appears to be necessary and feasible in the first instance, there is some doubt about the ability to achieve a high degree of coordination of a multiplicity of not "like" service providers.

More art than science: assessing the value-added of TRTA/CB

Until recently, trade-related assistance has frequently been delivered in a somewhat random, indiscriminate manner (Saez, 2004), often outside of a coherent framework for economic development and poverty alleviation, and with little systematic evaluation of results.

There are, however, signs of increasing interest in the issue of TRTA/CB evaluation as several bilateral donors have embarked on ambitious reviews of their own bilateral programs and participation in multilateral programs. In particular, the shift towards results-based management of development assistance and the mainstreaming of development considerations into trade negotiations are creating higher expectations for aid evaluation and thus appear to be putting new pressure on policy makers to address such challenges. The fact remains, however, that there is still today no unified framework for TRTA/CB evaluation (Solignac-Lecomte, 2004).

Project evaluation is an important tool for maximizing the effectiveness of development assistance, directing resources where they can best be used, and ensuring that projects meet their objectives. Evaluation is essential to improving: (i) the effectiveness of aid for trade; (ii) accountability to recipients; and (iii) accountability to taxpayers in donor countries. TRTA/CB projects pose challenges from an evaluation perspective, however, because they frequently lack concrete outputs, must contend with chronic problems of data paucity, are usually directed at institutions that do not measure their success quantitatively, pose intractable problems of attribution (e.g. they are but one of many influences potentially shaping trade performance), and will typically have effects that are only visible in the long term. As with matters of donor coordination, there is the additional challenge of distinguishing evaluation needs and measurement tools as between various types of TRTA/CB activities (e.g., it may be comparatively easier to assess changes in supply/export performance than in institutional performance).

The problems described above are hardly unique to trade-related capacity building. For this reason, there is still much that the trade policy community can learn from the experience, tools and methodologies of assessment that have been developed and used in other areas of development assistance.

Conclusions

Based on the foregoing analysis, five areas can be identified where further analytical work could yield significant trade and developmental payoffs:

(i) identifying best practices in multi-stakeholder consultations;
(ii) identifying best practices in intra-governmental coordination;
(iii) appointing a group of distinguished trade and development officials to establish a methodological framework for performing a developmental audit of trade agreements;
(iv) developing a checklist of qualitative and quantitative indicators with which to assess the effectiveness of TRTA/CB; and
(v) institutionalizing an annual high-level dialogue on TRTA/CB between the trade and development communities.

The developmental returns stemming from the transfer of best practices in the area of needs identification and prioritization are likely to be significant. The establishment of training activities, web-based case studies and checklists dedicated to the study and local adaptation of multi-stakeholder consultation mechanisms have proved successful in some countries.

A similar set of best practice "how to" guides or checklists could also be beneficial with regard to the channels of communication and policy coordination modalities used in the context of intra-governmental coordination.

A methodological framework to carry out a development audit of prospective trade agreements at the country level (including an eventual DDA) could prove particularly useful in helping WTO members honour their December 2002 LDCs Accession Guidelines. It would focus attention on provisions to facilitate developing country inclusion in the global rule-making system, including, *inter alia*, through: (i) appropriate transition and review periods; (ii) an assessment of the cost against the availability of resources to help build capacity to implement WTO agreements; and (iii) an analysis and recommendations of appropriate policy sequencing to meet WTO commitments within the context of a country's overall development process.

Because of the relative novelty of the TRTA/CB agenda, little tangible progress has been made in identifying robust means of assessing the quality and effectiveness of TRTA/CB activities and to measure their tangible contribution to the development process. A checklist of qualitative and quantitative indicators could be usefully compiled for purposes of TRTA/CB assessment.

An annual meeting of Deputy-Minister level trade and development officials to discuss the evolving TRTA/CB agenda in the light of shifting priorities, resources and advances in bilateral, regional and multilateral negotiations could serve to promote the coordination of efforts that has all too often been lacking in the past.

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A Framework for Poverty Reduction through Trade-related Capacity Building

Blanka Pelz*

Introduction

Developing countries have become increasingly integrated into the global economy and more engaged in the multilateral trading system in order to promote economic growth and sustainable development. Trade and trade policy have important linkages to poverty reduction through their impacts on agriculture, rural development, health, education, labour and employment, access to technology, the environment and culture. It is hardly surprising, therefore, that international aid organizations are seeking to adapt their international development programs to assist developing countries to build the kind of capacity they need to more effectively use trade as a central feature of their economic development policy.

Since 2001, Canada has provided over C$310 million in support to trade-related technical assistance and capacity building (TRTA/CB), 91 percent of which has come from Canada's international development agency, CIDA. This is not only a significant amount in and of itself, but also represents a considerable increase in TRTA/CB spending over that of the preceding decade. In part, this reflects the commitments that Canada has made to provide TRCB multilaterally, such as in support of the Doha Declaration (2001) at the WTO, regionally, for example within the Free Trade Area of the Americas (FTAA) and bilaterally, for example through labour cooperation agreements.

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[*] Blanka Pelz was until recently Acting Trade Team Leader in the Policy Branch of the Canadian International Development Agency (CIDA). Special acknowledgement is extended to Paul Mably, Consultant to CIDA's Trade Team and author of *CIDA's Strategic Approach to Trade Related Capacity Building (TRCB)*, upon which this chapter is based. This chapter does not represent a statement of CIDA policy.

TRCB is also a necessary element in fulfilling Canadian commitments to the Monterrey Consensus on Funding for Development and the United Nations Millennium Development Goals (MDGs). These goals emphasize poverty reduction, gender equality and sustainable development.

This chapter sets out the conceptual framework for the expanded role of TRCB in Canada's international development assistance, as described in *CIDA's Strategic Approach to Trade-Related Capacity Building (TRCB)*. It articulates the role that trade plays in poverty reduction and the role that TRCB can play in promoting the ability of developing countries to tap into the global economy through trade and investment.

A Definition of Trade Related Capacity Building

TRCB may be defined as follows:

> *Activities that create the necessary skills and capacities among government, private sector and civil society actors to enable them to work together to analyze, formulate and implement trade policy; to build trade related institutions; to engage in trade and to supply international markets; to negotiate and implement trade agreements; and to address the need for transitional adjustment measures for sectors and groups of people affected by trade reform.*

It is useful to distinguish between this concept and "technical assistance". Although these terms are sometimes used interchangeably, there is a difference of meaning that is important in determining the objective of the assistance and the methodology of its provision.

Technical assistance is an activity where technical knowledge is shared or exchanged. It may contribute to an ongoing capacity to perform particular functions[1], but does not necessarily seek this result. Technical assistance activities are often discrete and one-off in nature.

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[1] For example, in the case of trade, technical assistance has been used to assist developing countries to understand WTO rules and to identify their interests in on-going trade negotiations. Insofar as this knowledge is retained, it will have contributed to enhanced trade policy capacity in the recipient country.

Capacity building by contrast seeks the sustainable acquisition of technical skills and capacities, and to enhance ownership by partners in developing countries of all trade related processes from policy to actual exchange of goods and services. It is a people-centred, learn-by-doing approach. It implies a consciously participatory methodology, involving a number of (continuous or mutually supportive) interventions. It is intended to produce lasting change for the reduction of poverty.

With respect to the term "trade related", confusion can arise with reference to supply enhancement and infrastructure programs. For example, training developing country producers to grow a better rice crop is not inherently trade related. Teaching them to process and package the rice according to international standards and in compliance with customs procedures in importing countries *is* trade related. Similarly, building a road or a port may assist trade, but contributing to the building of such infrastructure, either through financing or by providing technical know-how does not build human capacity to trade.

Trade-Related Needs of Developing Countries

There is general agreement that trade and trade openness can contribute to economic growth. It is also agreed that poverty reduction is unlikely to take place in the absence of economic growth. Growth has the potential to create jobs for the poor, and to generate the resources necessary to fund social programs that meet basic needs such as housing, health and education. However, trade openness and economic growth do not *automatically* translate into poverty reduction and increased economic equity. Deliberate action to reduce economic disparities is also necessary.

Developing countries and countries in transition face a variety of needs when trying to reduce poverty through trade.

Needs related to the enabling environment for economic activity in general, of which trade is but one aspect, include:

- Stable political, security and macroeconomic conditions, such as freedom from civil strife, stable political institutions, effective and transparent public administration, personal safety, a stable currency and a reasonable degree of price stability.

- Qualified and healthy individuals, which implies well-developed education and health systems. Countries with low literacy rates or serious health problems such as HIV/AIDS will have difficulty generating a human resource pool capable of engaging effectively in domestic economic activity, a prerequisite to expanding their markets into the international sphere.
- Access for individuals to technology, capital and land. Many of the world's poor, especially women, need to find their way around discriminatory legal and regulatory frameworks as well as poorly developed banking and financial service sectors in their efforts to increase their incomes and improve their productive capacities.[2]

The more specifically trade-related needs may be loosely grouped into four categories:

- Trade and development policy capacity
- Trade readiness
- Effective participation in international trade agreements
- Business, social and workforce adjustment programs and policies.

These needs are interdependent: improvement in one area without improvement in the others may not produce the desired outcome in terms of sustainable development and poverty reduction. Accordingly, they need to be addressed in a comprehensive manner. That being said, TRCB support may be directed to only certain of these needs, depending on the priorities established by the recipient countries themselves.

Trade and development policy capacity

Without strong sub-national, national and regional policy frameworks to support private sector development, government service delivery and social objectives, it is difficult for countries to successfully meet the other three categories of needs. Achieving adequate policy capacity is therefore of key importance.

Governments in developing countries and countries in transition (or regional structures for such countries) require a strong cadre of policy-makers to determine an overall economic and social policy framework[3] and to set trade policy priorities within that framework, while considering potential market opportunities. They need to be able to assess the impacts of trade decisions throughout society: on existing and emerging productive capacities; on large, medium and small-scale private sector development; on the labour force; on government revenue generation; and on poverty reduction efforts in all parts of the country and all social sectors. An important part of this is taking into account the gender-differentiated impacts of trade liberalization, and the way that gender inequalities affect trade performance. Because trade agreements increasingly have an impact on behind-the-border policies, trade policy-makers must also consider the relationship of their policies to rural development, education, health, fiscal policies, environment, labour markets and the workforce, culture and the like. The implications of new technologies for trading opportunities must be taken into account. Trade related policies also need to be coherent with other international policies and obligations, for example, with multilateral environmental agreements (MEAs) such as the Convention on Biological Diversity. These requirements are hard to meet in advanced countries; the challenges in the developing countries and countries in transition are thus all the greater.

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[2] See *Expanding Opportunities through Private Sector Development*

Beyond policy-making, developing countries and countries in transition face constraints in assembling and implementing the necessary legal frameworks to govern such areas as trade, financial services, intellectual property rights, environment, labour and social programs.

Trade readiness

In many developing countries and countries in transition, a variety of factors make it difficult for suppliers, both private and otherwise, but especially small and medium enterprises (SMEs), to seize the opportunities provided by market openness to produce and deliver goods and services that can compete on national and international markets:

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[3] For example, a poverty reduction strategy paper (PRSP).

- Institutions and services. Efficient and equitable services and institutions, administered in a clear and transparent manner, are needed to support private sector activity and to make trade happen. These include:
    - reliable and timely statistics, information management systems, and trade facilitation and promotion programs;
    - fora for government-private sector and inter-ministerial collaboration;
    - institutions to set and administer national and international standards and technical regulations in areas such as agriculture, the environment, labour, health and safety, shipping and packaging;
    - competent customs administrations to ensure that goods and services are properly valuated, and fulfill the technical, safety, health and sanitary requirements set by the government; and
    - institutions for granting export and import permits.
- Access to information. Exporters need access to information on and the ability to cope with:
    - international standards and technical regulations;
    - sector- and product-specific foreign market opportunities and preferences[4];
    - the quality of product demanded;
    - speed and reliability of production and delivery; supply and distribution networks; and
    - license acquisition[5].

All of these requirements can vary significantly from market to market.

- Access to business relationships. Enterprises in developing countries and countries in transition, particularly SMEs, require sustainable commercial linkages, in-country and internationally. Face-to-face or virtual linkages to suppliers, technology and innovation sources, market opportunities, finance and training are all important. Inclusion in trade networks and international partnering arrangements with other enterprises, private sector associations, academics and research centres leads to greater trade enabling and competitiveness.

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[4] For example, information to potential LDC exporters regarding Canada's preferential access under the LDC Initiative.

[5] Availability of information and communications technologies (ICTs) plays an important role here. Lack of well functioning ICT infrastructure frequently acts as a constraint in developing and transition countries.

- Infrastructure. To move goods and services to export markets, countries require a sufficiently developed economic infrastructure of road, rail, air, port, storage, power and communications networks, and the backup service facilities to keep them running.

Effective participation in international trade agreements

International trade agreements have become complex, legally binding instruments with a far wider scope than the early multilateral agreements that were primarily concerned with lowering border tariffs on traded goods. Agreements now cover trade in both goods and services. Some go beyond trade itself, to include areas such as intellectual property rights (e.g. patents). These new rules increasingly reach inside the border and affect domestic economic, social and environmental regulations, including at the sub-national level, that can serve as non-tariff barriers to trade.[6] While it is important for developing country exporters that such non-tariff measures not bar them from access to foreign markets, the international rules that govern such measures also affect developing country domestic regulations. The new rules are not designed to reduce poverty *per se* and can have differential impacts on different groups in society. In other words, some benefit more than others, and some are affected negatively.

Governments of developing countries and countries in transition thus face a daunting challenge in negotiating international trade agreements that can help expand trade and thereby contribute to both economic growth and poverty reduction. Most consider that the Uruguay Round of WTO agreements have not yielded the results they expected. The Doha Round has thus become an important test[7]. Areas in which capacity building can help make trade work for the poor include:

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[6] These can include, for example, standards and regulations such as those governing the safety of foods entering a country.

- Developing negotiating positions. To make trade agreements work for the poor, governments need people with the skills to effectively consult with organizations representing the poor, those working with the poor, and other stakeholders, and with the analytical skills to turn such advice and information into negotiating positions that are coherent with national pro-poor development plans and trade policy, and that take the full range of national interests into account.
- Negotiations. Most governments of developing countries and countries in transition face difficulties in participating effectively in relation to all the subjects under negotiation, especially when multiple, concurrent negotiations are taking place at various levels - multilateral, regional and bilateral – and in different locations. Most experience chronic shortages of expertise and finances to undertake these exercises and face well-funded, well-supported developed country negotiation teams across the table. Even when they are capable of developing and defending positions, developing countries (with some exceptions) lack market power in the goods and services they sell, and have little to offer in the way of domestic market demand for other countries' goods and services. Thus there is a need for developing countries to build negotiating alliances to increase their clout. For small countries, one of the ways to help overcome these limitations is to combine efforts at regional levels, such as the Caribbean Community (CARICOM), in larger blocs such as the Group of 77[8], or coa-

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[7] "What [developing economies] gave (apart from the exchange of tariff cuts) was mainly acceptance of "codes" on major areas of domestic as well as import regulation/institutions (e.g., intellectual property, technical and sanitary standards, customs valuation, import licensing procedures). What they got in return from the developed countries is MFA [Multi Fibre Arrangement, on textiles] elimination – not due until 2005 – trade liberalization and reduction of domestic support on agricultural products – yet to be negotiated", Finger and Schuknecht (1999), p. 1.

[8] The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the "Joint Declaration of the

litions around shared interests such as the Net Food Importing Developing Countries.

- Implementation. Once negotiations are complete, governments of developing countries and countries in transition face the costly, technically demanding and, at times, politically difficult task of implementing their trade obligations within the agreed upon deadlines. Many developing countries requested more time and more assistance to implement agreements made at the WTO back in 1995 - to revise laws, regulations, policies and procedures necessary to achieve compliance with the requirements of the WTO and other agreements. Developing and transition countries also need to develop their ability to defend their interests through the dispute settlement mechanisms available in trade agreements. Poorer countries have had more difficulty using and benefiting from these mechanisms than richer ones
- Benefiting from trade agreements. Developing and transition countries may need assistance to realize the benefits that trade agreements make available and to exercise their rights as members of the agreements. For example, capacity building may assist them in adapting their exports to the sanitary or phytosanitary standards of industrialized country markets, or in developing the ability to influence the evolution and harmonization of standards at international bodies such as the Codex Alimentarius Commission (concerned with food standards).

Business, social and workforce adjustment programs and policy

As a result of trade liberalization, internationally competitive industries gain, while uncompetitive industries – and those who work in and serve them – lose. Capital and labour employed in sectors that become uncompetitive thus must be reallocated.

Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Although the membership of the G-77 has increased to 133 countries, the original name is retained.

The transition can be costly and livelihoods may be at risk, especially for poor producers and SMEs.

Smaller, poorer developing countries that are pressed to foster sustainable business and employment opportunities at the best of times face particularly difficult transitional challenges. Responses to their needs may include help with new business development, business culture and technological capacity; workforce adjustment, training and mobility programs; changes to industrial and employment policy or special capital funds and/or credit.[9] Support for the implementation of sound labour policies that ensure core labour standards and encourage social dialogue can foster social and political stability and effective human capacities that help attract investment and create more and better jobs. These responses will have to be tailored to the specific needs of different occupational groups, as identified through gender-sensitive economic and social analysis.

Social groups that are already under stress from poverty are not in a position to weather new adverse shocks from trade liberalization. To minimize the negative impact on these groups, there will be a need for social policies and programs that address gender-differentiated problems of landholding, housing, health, education and employment opportunities. Countries will need to consider the distinct needs of women, the disabled, members of national and cultural minorities, the rural and urban poor and other vulnerable groups in their policies and programs.

Tailoring Trade-Related Capacity Building to Developing Country Needs

In tailoring a TRCB strategy, consideration has to be given to the range of actors in developing countries, the various entry points and the national policy frameworks into which the support flows.

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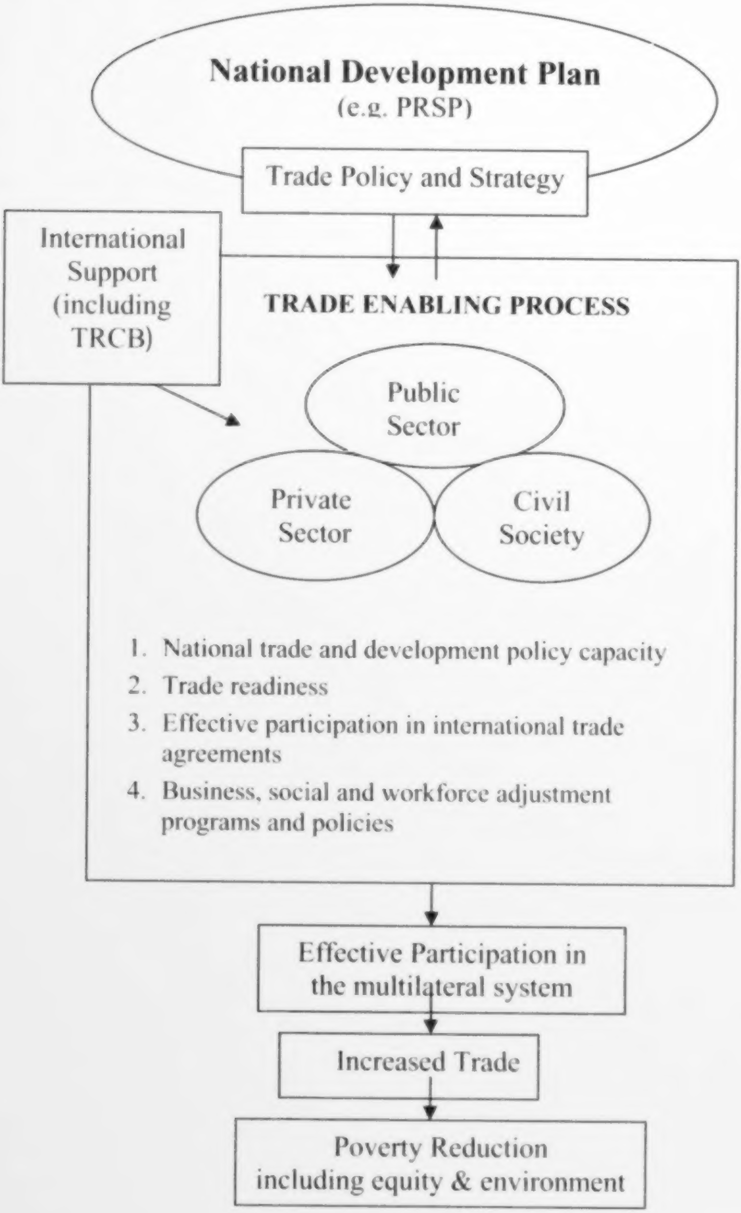
[9] A Canadian example of adjustment assistance is the C$ 33 million over four years provided by the federal government to Canadian textile and clothing manufacturers so they can become more innovative and ready to pursue new market opportunities.


National Development Plan
(e.g. PRSP)
Trade Policy and Strategy
International Support (including TRCB)
TRADE ENABLING PROCESS
Public Sector
Private Sector
Civil Society
1. National trade and development policy capacity
2. Trade readiness
3. Effective participation in international trade agreements
4. Business, social and workforce adjustment programs and policies
Effective Participation in the multilateral system
Increased Trade
Poverty Reduction including equity & environment

In terms of actors, TRCB support should be extended to any of those active in trade or in a position to influence trade policy and practice. These can include:

- The political leadership, legislators/parliamentarians
- Government policy-makers, negotiators, ministries, commissions, corporations
- Members of national development or PRSP committees
- Enterprises, cooperatives, business consortia and private sector and professional associations
- Trade support institutions
- Labour unions, NGOs, women's groups, other civil society groups
- Universities and independent research entities
- Regional trade or economic organizations
- Multilateral organizations
- Media

TRCB support may be provided at various levels, the specific entry point being chosen for its capacity to exert strategic influence.

- Global/multilateral: for example, WTO, Integrated Framework;[10]
- Regional: the Joint Integrated Technical Assistance Program (JITAP), FTAA;
- National/bilateral: ministries, business associations, labour unions, NGOs;
- Sub-national/sectoral: business and professional associations, unions, cooperatives, NGOs;
- Micro/informal: SMEs, research groups.

TRCB needs to be designed with national development plans and the trade enabling process in mind. The diagram below describes the interaction among local actors engaged in an on-going consultation and trade-enabling process addressing the four categories of trade related needs.

The trade policy that emerges from this interaction is embedded in the national development plan and thus more likely to result in poverty reduction being achieved from increased trade than otherwise might be the case. International donors may have varying degrees of involvement in the process, depending upon the type of partnership relationship established.

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[10] The Integrated Framework (IF) refers to the Integrated Framework for Trade related Technical Assistance to Least-Developed Countries.

Such an approach is consistent with the following principles that guide international aid policy, and the TRCB strategies, of agencies such as CIDA:

1. Poverty reduction, which is a central and primary objective of international assistance. TRCB should be assessed in relation to its impact on the poor.
2. Local ownership: the purpose of TRCB is to help countries to become self-sufficient in policy and institutional development, trade readiness, agreement negotiation and implementation, in ways that make sense to them. Though developed country partners can contribute to this process, people in developing countries and countries in transition need to take the lead in identifying their own needs and strengths, mobilizing the expertise in their own countries and ensuring that all relevant stakeholder voices are heard, including those of women, the poor, and ethnic minorities. TRCB is not a means for proselytization, compliance enforcement or trade promotion by donors. TRCB is about having a menu of programming options to support policy and action. It should empower developing countries and countries in transition to understand the choices available to them and to participate effectively in the design of international trade rules.
3. Promote well-functioning markets: TRCB plays a role in the creation of markets that function well for private companies, for women and men, for workers and citizens, and for the environment; markets that are not unduly protectionist; and markets that are embedded in a range of non-market institutions which create, regulate, stabilize and legitimate them, and prevent market failure. High quality government, private sector and social institutions, and appropriate policies, are required for strong markets and for the type of trade that translates into sustainable livelihoods and poverty reduction.

4. TRCB Coordination: Though coordination of TRCB is not new[11], because the Doha Ministerial Meeting gave TRCB a much higher profile, levels of commitment have increased, therefore the need for coordination is greater. In general, no single donor can meet all the TRCB needs of a country. Agencies like CIDA must continue to seek complementarity of roles and activities within the Agency, within the Government of Canada, with developing countries and countries in transition, other donors, multilateral agencies, the Canadian private sector and NGOs.
5. Institutional Capacity Building: Experience in TRCB and in other program areas has pointed to the need to go beyond building capacity in individuals – who have a tendency to be mobile and often have limited impact within their organizations – to building institutional capacity. This is generally a long-term process. To be sustainable, TRCB must be based on institutions that are driven by strong political commitment to good public sector and corporate governance.
6. Promoting a healthy economic, social and cultural diversity: Each country must be able to develop its own method of relating to the market, on the path to achieving economic growth and poverty reduction. One size does not fit all. Interventions must be differentiated according to the diversity of levels of development, capacities and competitiveness among developing countries and countries in transition. They recognize that international rules are required, but rules that respect the need for equity and the essence of individual cultures.
7. Gender equality: Gender-based inequalities in control over resources such as land, credit, information and skills and women's unequal household and childcare responsibilities hinder the ability of women to take advantage of new opportunities created by trade liberalization. Perhaps more importantly, gender inequalities also constrain the output response and thus the export capacity of the whole economy.
8. Contribute to environmental sustainability: The management of a country's environmental resources will have an impact

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[11] The Integrated Framework (IF) was inaugurated in October 1997.

on its long-term prospects for development. Trade patterns may have negative environmental impacts. This is particularly true in developing countries and countries in transition where trading activities and the livelihoods of the poor are often highly dependent on the natural resource base.

Conclusion

This chapter sketches some of the recent thinking at CIDA on the subject of Trade Related Capacity Building. It is one contribution to a growing international literature on a subject that has acquired specific importance in the three years since the beginning of the Doha Development Round. Donors and recipients alike are looking for ways to improve their TRCB theory and practice.

The paper on which this chapter is based incorporated views from all CIDA branches, from other Canadian government departments, private sector groups and non-governmental organizations. The sense was that TRCB, in the context of the Doha Round and other trade agreement negotiations, should become a means to making trade a tool for development and for poverty reduction in developing countries. Most will agree that there is still a long way to go to make this happen. Now, after three years, some of results of TRTA and TRCB efforts are in[12]. But there is still much to be done. For example:

- Develop a TRCB policy and approach at the level of the Canadian government.
- Distill, disseminate and assimilate lessons on best practices in TRCB geared to poverty reduction.
- Broaden coverage of TRCB beyond core government trade officials to other ministries, SMEs and civil society groups.
- Increase regional-level and cross-sectoral TRCB as a way of fostering broader trade alliances among developing countries.
- Better integrate gender equality into TRCB practice.
- Secure commitments to longer-term TRCB efforts embedded in long-term development strategies

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[12] For example, an evaluation of the Integrated Framework is available, and the UK Government' Department for International Development (DFID) published an evalution of its TRTA/CB program in the fall of 2004.

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Part III

Canadian Trade and Investment Policy Development: Analytical Issues

Canadian Trade Policy Development: Stakeholder Consultations and Public Policy Research

Dan Ciuriak[*]

Introduction: Setting the Canadian Context

The way in which public policy is developed is highly particular to the context—the political and institutional framework of the country, the subject area, and the issues and events of the day.

Canadian trade policy formation is no exception, being very much shaped by its context, of which several elements are especially noteworthy:

- Canada's form of government, namely the Westminster model of government applied in a federal state that is constitutionally shaped by Canada's own particular historical evolution;
- the recent admixture of participatory democracy that in turns drives transparency as an important feature and indeed an important objective of policy;
- the migration of trade policy issues from dealing with border measures to inside-the-border domestic regulatory frameworks; and

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[*] Dan Ciuriak is Senior Economic Advisor, Trade and Economic Policy and Trade Litigation, Department of International Trade. This Chapter is based on notes prepared for discussion at the OECD Expert Meeting on "Developing Governmental Analytical Capacities in the Trade Policy Area", Moscow, 3-4 June 2003. It draws heavily on departmental resources and has benefited from detailed comments from departmental colleagues, including John Curtis, Brian Morrisey and Randle Wilson. Any remaining errors are the responsibility of the author. This paper was developed in a personal capacity; accordingly, the usual disclaimer applies: the views expressed are those of the author and are not to be attributed as official views of the Department of International Trade or the Government of Canada.

- Canada's present circumstances as a highly open economy which in fact has become its own second major trading partner—in other words Canada now ships more goods to the United States than it ships to its own domestic market.[1]

The features of Canada's version of the Westminster system that are salient for the formation of trade policy are:

- the role of Cabinet in setting the parameters for Canadian trade negotiators;
- the role of Parliamentarians and Parliamentary Committees as a sounding board for Canadians' views, and
- the role of a career civil service that impartially serves the government of the day, providing professional policy advice that is encouraged to be empirically based, reflecting analysis conducted within its own ranks but also drawing on academic literature, the advice of the epistemic community, and the results of consultations with provinces, interest groups and the general public.

Cabinet, Parliament and the civil service are each at the centre of a network of connections that bring high politics, constituent grass roots politics and technical/professional influence to bear on trade policy. How this framework "manufactures" trade policy has changed as the context has evolved, especially over the course of the last half-decade or so.

First, with the implementation of the Canada-US Free Trade Agreement and its successor, the North American Free Trade Agreement (NAFTA), as well as of the Uruguay Round of multilateral trade negotiations that brought into being the World Trade Organization (WTO), the vast bulk of Canada's merchandise trade was effectively liberalized; few sectors, mostly agricultural, remained protected from foreign competition by high tariffs. Consequently the level of interest in trade negotiations of the business community, which had previously been an important driver of trade policy, noticeably waned in Canada—as it did, with a few exceptions, elsewhere.

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[1] See: *Fourth Annual Report on Canada's State of Trade*, (Ottawa, Department of Foreign Affairs and International Trade, May 2003), at p. 20.

Meanwhile, as a result of the ongoing shift of focus of trade policy towards issues that were formerly the exclusive province of domestic regulation—including many areas of services that became potentially subject to trade liberalization under NAFTA and the WTO's General Agreement on Trade in Services (GATS)—trade liberalization became increasingly the focus of interest of the civil society movement in Canada, as it did abroad. This movement has added another network, one without an identifiable central node but with some degree of influence over the formation of trade policy.[2] The flowering of this movement caught trade policy practitioners by surprise and to some extent left them at a loss as to how to respond. But in Canada at least the initial reaction of "us against them" gave way to an embrace of "transparency", itself a major procedural objective of civil society. In fact, Canada has been at the leading edge internationally in responding to this demand. For example, even prior to the WTO Ministerial meeting at Seattle in November/December 1999, Canada submitted a proposal to the WTO on transparency.[3] At Seattle, Canada instituted regular briefings for Canadian civil society representatives. Canada also brokered agreement to make public the draft text of the Free Trade Area of the Americas (FTAA) process,[4] and recently published its negotiating position in the GATS.

The reach of trade policy inside the border also made the formulation of policy within government far more complex as the number of departments and agencies that had interests in the negotiations grew sharply. This has complicated the interdepartmental process required to prepare Cabinet Memoranda that request the negotiating mandate from Cabinet for the Minister for International Trade.

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[2] For a discussion, see John M. Curtis, "Trade and Civil Society: Toward Greater Transparency in the Policy Process" in John M. Curtis and Dan Ciuriak (Eds.) *Trade Policy Research 2001* (Ottawa: Department of Foreign Affairs and International Trade, May 2001): 295-321.

[3] See "Canadian Proposal on WTO and Transparency", October 1, 1999, registered with the WTO as WT/GC/W/350. Available at http//:www.dfait-maeci.gc.ca/tna-nac/discussion/transparency_pr-en.asp

[4] Approval for publication of the FTAA text is set out in paragraph 23 of the Ministerial Declaration at the Sixth meeting of Ministers of Trade of the Hemisphere, Buenos Aires, April 7, 2001. For a sense of the hurdles involved in obtaining this approval, even in the days immediately preceding the Ministerial Declaration, see Les Whittington, "Secrecy still shrouds free trade details: Official says Canada lacks backing for making text public", *Toronto Star*, March 31, 2001.

Accordingly, what from today's perspective might be termed Canada's "traditional" consultative framework for trade policy[5] became less congruent with the issues taken up in the post-NAFTA, post-WTO era, and accordingly less congruent with the structure of interest groups engaged on trade policy.

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[5] The "traditional structure" was itself rather short-lived. The early GATT rounds, up to and including the Dillon Round, were limited to cutting tariffs; since tariff changes are subject to budget secrecy, these negotiations were conducted without public scrutiny. This was also the era of the "club" model of international policy—trade ministers had their "club", finance ministers theirs, and so forth; see Robert Keohane and Joseph Nye, "The Club Model of Multilateral Cooperation and the WTO: Problems of Democratic Legitimacy", paper delivered at the conference *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, June 1-2, 2000, John F. Kennedy School of Government, Harvard University http://www.ksg.harvard.edu/cbg/trade/keohane.htm. In a political-economy sense, the legitimacy of this approach to trade policy formulation depended in part on what has been called the "permissive consensus"; see Sylvia Ostry, "WTO: Institutional Design for Better Governance", paper delivered at the conference *Efficiency, Equity and Legitimacy, op cit*, at p. 4. For a testing of the Ostry insight, see Matthew Mendelsohn, Robert Wolfe and Andrew Parkin, (2002) 'Globalization, Trade Policy and the Permissive Consensus in Canada,' Canadian Public Policy 28:3 (September 2002), 351-71. This consensus gradually eroded and by the time of the Kennedy Round, governments had to try and "sell" trade; for a discussion see: John M. Curtis, "The Role of Contextual Factors in the Launching of Trade Rounds", in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2002* (Ottawa: Department of Foreign Affairs and International Trade, May 2002) at p. 50. In Canada, the Canadian Trade and Tariffs Committee was struck to receive briefs and hold hearings in preparation for negotiations (see William A. Dymond, "The Consultative Process in the Formulation of Canadian Trade Policy", Centre for Trade Policy and Law, Carleton University, http://www.iadb.org/int/DRP/ing/Red1/documents/DymondCanadianConsultation09-02eng.pdf.) The "traditional structure" referred to here was thus itself an evolving system that became progressively more complicated as Canada's involvement in the Kennedy, Tokyo and Uruguay Rounds and in the FTA/NAFTA negotiations unfolded.

The historical period that produced these pivotal trade agreements was a high water mark for Canadian trade policy practitioners. To negotiate the FTA, the NAFTA and the Uruguay Round, Canada recruited from within the civil service and academia a group that was called "the best and the brightest" to staff the Trade Negotiations Office (TNO) and its successor units at the former Department of Foreign Affairs and International Trade. With the conclusion of these agreements, this group dissipated. At the same time, during Canada's massive fiscal consolidation of the early to mid-1990s, reinvestment in policy analytical capacity government-wide was lacking—a point fully acknowledged within the Government of Canada which subsequently established the Policy Research Initiative (PRI) to begin to restore that capacity.

Accordingly, in recent years there has been a significant evolution in the way that Canada develops trade policy, the way in which the Government of Canada communicates and through outreach builds support for trade policies, and the way in which research and analysis is brought to bear to underpin policy formulation and communication.

The next section of this paper provides an overview of Canada's trade policy development process. The third section then describes the issues faced in Canada in building up trade policy research analytical capacity and in bringing the results of research to bear on policy and in public outreach. The final section draws some conclusions, with a particular view to drawing out possible insights from Canada's experience for other countries that are grappling with the challenges of deeper integration in the global economy.

Canada's Trade Policy Development and Consultations

Cabinet Authorization

Executive authority for the conduct of international trade policy in Canada's parliamentary system of government is vested in Cabinet. To obtain Cabinet support for proposed international trade policy initiatives, the Minister for International Trade submits a Memorandum to Cabinet outlining the proposed participation in negotiations, the costs and benefits thereof and an assessment of the various issues and risks involved. The preliminary work to facilitate Cabinet approval is conducted by officials from the Department of International Trade, who consult with counterparts from other government departments and agencies whose interests might be affected by such negotiations. Traditionally, the main interdepartmental consultations involved the Department of Finance which is responsible for the tariff, Industry Canada which is responsible for structural economic policy, and Agriculture and Agri-Food Canada which is responsible for agricultural policy. Today, in the case of the agricultural negotiations launched pursuant to the WTO's "built-in agenda" in 2000, Agriculture and Agri-Food Canada has taken the lead. Meanwhile, with the growing reach of trade policy inside the border (through, for example, the GATS) various other departments have become an important part of the interdepartmental process. With the reorganization in which the former Department of Foreign Affairs and International Trade was split into two new ministries, the Department of Foreign Affairs and the Department of International Trade, the previously in-house consultations on linkages between Canada's broader foreign policy and trade policy have now become inter-departmental.

The Cabinet process drives interdepartmental consultation as officials seek to avoid the risk of Cabinet not giving its approval. It also creates a natural demand for supporting analysis; however, as will be discussed below, the combination of greater complexity of issues and limited resources available for research has meant that this potential demand for rigorous, quantitative analytical results has not yet been adequately satisfied. This poses an important developmental agenda for the Department of International Trade and other government departments and agencies whose policies and programs are affected by trade and investment.

The steps in the process for approval of a Memorandum to Cabinet (MC) follow standard governmental processes:

- Initial consultation is directed by the Department of International Trade and is government wide, reflecting the pervasive impact of trade negotiations ranging from international relations (Foreign Affairs), the tariff (Finance), environmental assessments (Environment), impact on jobs (Human Resources Development), economic structure and programs (various departments, including Industry, Agriculture and Agri-Food, and Natural Resources), and rules (various government agencies such as Customs and Revenue Canada, the Competition Bureau, etc.). Obtaining the approval of these various departments and agencies depends on close consultations with those officials who steer the MC through their own departments/agencies for signature.

- Within the Department of International Trade, internal consultation involves first Department-wide meetings to get agreement on general objectives and priorities (which include Canada's position in the world community), then issue-specific meetings on the supporting analysis.
- The Privy Council Office (PCO) directs the process and introduces broader policy considerations—including the political and political economy issues raised by the trade policies under consideration, as well as any particularly sensitive issues facing the government.
- Individual subject matter experts are expected to reach consensus in their areas. To be successful, this process requires a collegial atmosphere and the understanding that the individuals are involved in an iterative game—that is, the same individuals will meet again under other circumstances where they will need support from colleagues and so accommodation of others' needs pays off in terms of reciprocal cooperation down the road.

Parliament, Parliamentary Committees and Parliamentarian engagement

Trade agreements are tabled in Parliament; insofar as implementation of the agreements might require new legislation, Parliamentary approval would be required, which would normally be forthcoming in the usually prevailing circumstance where the government of the day has a majority in the House of Commons, the lower chamber of Parliament.

Outside the process of dealing with legislation, Parliamentary Committees have become a prominent part of the consultative process on trade policy, especially since the public turbulence that welled up in the mid-1990s. The House of Commons Standing Committee on Foreign Affairs and International Trade and its Sub-Committee on International Trade, Trade Disputes and Investment have held public hearings on Canada's trade policies, including its priorities within the WTO and FTAA contexts; market access for Least Developed Countries; and other issues being dealt with in the G7/8 and other international fora.[6] Other House of Commons committees, such as the Standing Committee on Agriculture, have also sought Canadians' views on Canada's trade policies and positions. Appendix 1 describes the role of a Standing Committee. The Standing Senate Committee on Foreign Affairs has also in recent years been active on international trade issues, having considered the legislation implementing the Canada-U.S. FTA, the NAFTA, the World Trade Organization Agreement, the Canada-Israel Free Trade Agreement and the Canada-Chile Free Trade Agreement.[7]

Canadian Parliamentarians also regularly participate in the multi-stakeholder consultations described below, in roundtable discussions, as panellists and speakers for information sessions sponsored by industry associations and NGOs; and as advisors to Canada's trade delegations. To better inform Parliamentarians of Canada's trade performance and trade policy priorities, reports have been tabled annually in Parliament on *Canada's State of Trade*[8] and on *Canada's International Market Access Priorities*.[9]

Canada is also working in various multilateral fora to examine ways to strengthen Parliamentarians' role during the negotiation and implementation of trade agreements. In October

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[6] The Sub-Committee has also visited other countries in exploring Canada's trade relations. For example, the Sub-Committee visited Japan from May 13-17, 2003, as part of its study on Canada's economic relations with the Asia Pacific Region.

[7] For a brief history of this committee see "The Standing Senate Committee on Foreign Affairs" at http://www.parl.gc.ca/english/senate/com-e/fore-e.htm

[8] See: http://www.dfait-maeci.gc.ca/eet/trade/state-of-trade-en.asp

[9] See: http://www.dfait-maeci.gc.ca/tna-nac/goods-en.asp#1Opening

2000, Canada publicly tabled proposals to make the WTO more transparent,[10] to promote public understanding of the WTO's mandate and to promote public engagement, including by Parliamentarians, in the WTO's agenda.

The Permanent Consultations Framework

The Department of International Trade uses a range of consultative mechanisms to solicit the views of provinces, industry, non-governmental and public interest groups, and Canadians at large on current trade policy issues. These mechanisms which evolved over the years, particularly in the 1980s as Canada geared up to conduct the free trade negotiations with the United States, have come to be called the "permanent consultations framework".

Federal-Provincial-Territorial Relations (C-Trade)

The so-called "C-Trade" process brings together representatives of Canada's provinces and territories on a quarterly basis to review trade and broader economic developments, to discuss ongoing and new emerging international trade issues. These consultations are becoming more important as international trade reaches more deeply inside the border and implementation of measures reached in trade agreements increasingly involves matters that fall under exclusive provincial or shared federal-provincial jurisdiction.

A consequential benefit of these consultations to federal officials is that provincial and territorial officials have helped to organize cross-Canada consultations for federal representatives on particular issues such as services trade negotiations.

The Minister of International Trade and the Deputy Minister also regularly hold meetings with their respective provincial and territorial counterparts as part of the federal-provincial consultation and consensus-building process and generally to keep the exchange of information flowing, especially in respect of issues raised in implementation of trade agreements in areas of shared jurisdiction.

In November 2001, a joint working group was established to address trade concerns of municipal and community-based groups. This initiative reflected the potential reach of GATS into services that are administered by municipalities, including water, as well as into areas of rule-making such as municipal zoning regulations.[11]

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[10] See: http://www.dfait-maeci.gc.ca/tna-nac/Transparency2-en.asp

Sectoral Advisory Groups on International Trade (SAGITs)

The sectoral advisory groups on international trade or SAGITs represent the evolutionary result in Canada of increasingly structured trade-related consultation with the business community that dates back to the establishment of the Canadian Trade and Tariffs Committee during the Kennedy Round of multilateral trade negotiations (1963-1967). The Tokyo Round (1973-1979) expanded the trade agenda to deal with non-tariff issues; this led to an expansion of the consultations on an informal basis to include think tanks and industry associations. However, the key development that deepened the consultative framework was the decision in the mid-1980s to pursue the Canada-US Free Trade Agreement. This prompted the formation of fifteen SAGITs to provide detailed advice on negotiations in specific industrial sectors and interest areas. Following the conclusion of the FTA, the SAGITs were retained to provide continuing advice on trade policy issues on a confidential basis to trade officials and to the Minister.

The current twelve SAGITs conduct their work via restricted web sites, through conference calls and in face-to-face meetings. In 2001/2002 there were close to 30 SAGIT meetings. Appendix 2 provides a description of the ongoing SAGITs.

Academic Advisory Council (AAC)

In 1998, the Deputy Minister for International Trade established an Academic Advisory Council to obtain on a regular basis the views of leading experts in economics, law, political science, and other disciplines on trade and other international issues. The views obtained from this source are seen as complementary to the input from interest groups and as providing a broader, more integrated analysis of ongoing and emerging trade and related social and economic issues. With the development of the *Trade Policy Research* series, and a regular survey of trade and investment-related research being undertaken in academic and think tank circles,[12] both of which have been provided to the AAC, the groundwork has been laid for greater ongoing collaboration between government and academic researchers.

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[11] These specific issues are mentioned in the discussion of GATS-related issues by Daniel Drache and Sylvia Ostry, "From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance" in John M. Curtis and Dan Ciuriak (eds.), *Trade Policy Research 2002* (Ottawa: Department of Foreign Affairs and International Trade, May 2002).

Multi-stakeholder Information Sessions and Sectoral Consultations

The Department of International Trade holds periodic information sessions with stakeholder groups to address trade and investment-related issues of interest to a broad spectrum of Canadians. Participants include from time to time the Minister and the Deputy Minister, as well as Parliamentarians engaged on the issues. In partnership with other government departments and agencies, the Department coordinates ongoing sectoral consultations over and above discussions within the SAGIT process that cover a range of issues already under negotiation, such as the General Agreement on Trade in Services (GATS).

Over the years, the number of stakeholder groups has increased greatly (Appendix 3 lists recent participants). This has its pros and cons. On the positive side, a greater range of input enriches the information base on which policy is made; many non-governmental organizations which participate in the multi-stakeholder consultations bring expertise to the table that may be lacking within government.[13] At the same time, the increase in the number of voices has the effect of diluting the influence of any particular voice; insofar as views are put forward which then do not find obvious reflection in government policy, there can be disenchantment with the process.

Public Outreach

The Department of International Trade maintains an active public outreach program. Departmental officials participate frequently in informal meetings, seminars, roundtable discussions etc. conducted across Canada. These provide opportunities for in-depth and issue-specific discussion/debate on policy concerns with business and industry associations, NGOs and public interest groups, and the academic community.

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[12] See: http://www.dfait-maeci.gc.ca/eet/survey/survey_report2002-en.asp

[13] See for example John M. Curtis, "Trade and Civil Society", *op. cit.* at p. 305.

Citizen Engagement

Going back to the unexpected civil society opposition to the OECD-sponsored Multilateral Agreement on Investment (MAI) and the disruptive protests at the 1999 WTO Ministerial in Seattle and subsequent meetings of the international financial institutions, the G7/8 and other similar events, it became eminently clear that not all Canadians agreed with every aspect of Canada's participation in global and regional trade talks.

The growth of the protest movement signalled the need to expand engagement with the general public. Raising public awareness of the importance of trade to Canada's economy and building support for Canada's trade policies consequently has become a more important part of the work of the Department of International Trade.

Based on annual surveys of *Canadian Attitudes toward International Trade,*[14] support for the Government negotiating free trade agreements has risen from 61% in 1999 to 71% in 2003 (see Appendix 4 for a description of this survey). This level of general support for trade policies is important to bear in mind in view of the media attention given to the criticism of trade liberalization. At the same time, awareness of the benefits of trade at the personal level has remained comparatively weak: Only about 35% of Canadians surveyed responded positively to the question "To what extent would you say international trade benefits you and your family?" This figure stayed basically constant over the period 1999-2003.

The Internet has greatly facilitated the ability for interested members of the public to submit their views. The Department of International Trade maintains a web-based consultative process which invites submissions from the general public (see the web page "It's Your Turn"[15]). Appendix 5 provides a list of past online consultations and current trade policy issues on which submissions are being solicited.

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[14] See: http://www.dfait-maeci.gc.ca/tna-nac/Consult6-en.asp

[15] See: http://www.dfait-maeci.gc.ca/tna-nac/consult-en.asp#Cur

To promote a more informed public debate, the Department of International Trade maintains extensive trade policy resources on its Internet website[16] including negotiating texts and Canada's submissions to the WTO on disputes in which Canada is involved—in addition to the already-mentioned annual publications detailing Canada's trade and investment performance, Canada's trade priorities, and trade policy research.[17] There is an encouragingly strong growth in the number of visits to these sites and downloads of documents.[18] The release of the annual *State of Trade* also provides an opportunity to the Minister to comment on topical issues in international trade in press conferences and public addresses.

The Department also coordinates opportunities for non-governmental Canadian participation in a range of international conferences and processes related to international trade; recent examples include the WTO Public Symposium, April 29-May 1, 2002; the OECD Forum 2002, May 13-15; and the annual OECD Joint Working Party on Trade and Environment and Trade Committee consultations that take place in the Fall. As well, Canadians from business and industry, citizen-based and public interest groups and the academic and research community have been invited to participate as advisors to Canadian delegations, including to the last three WTO Ministerial meetings in Seattle, Doha and Cancun.

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[16] See: http://www.dfait-maeci.gc.ca/tna-nac/menu-en.asp

[17] See: http://www.dfait-maeci.gc.ca/eet/menu-en.asp

[18] For example, the number of accessed files on the Department of International Trade's website for Trade Negotiations and Agreements, and the Trade And Economic Analysis Division have grown as follows:

Internet files accessed (millions)	2000	2001	2002	2003 (estimated)
Trade Negotiations and Agreements	6.8	12.2	14	17.2
Trade and Economic Analysis	0.41	0.63	0.96	2.3

Source: author's calculations based on departmental website statistics (note: 2003 data may not be exactly comparable to 200-2002 due to a change in the technology for counting website hits).

Government of Canada Public Access Programs

The Department of International Trade also uses traditional government communications instruments such as Canada Gazette Notices (the official record of government activities) to inform and solicit citizen's views (see Appendix 6 for a description).

Conducting and Communicating Trade Policy Research

To be most useful, research and analysis conducted within government needs to be closely linked to policy formulation. Ideally, the officer responsible for formulating positions on an issue would also be actively engaged in research. In a narrow sense of the term "research and analysis", this is inevitable—the exposure to the policy discussion surrounding an issue serves to drive the policy officer's understanding up the learning curve. Such "on-the-job" training allows policy formulation to proceed with reasonable efficacy even absent the kind of systematic, rigorous research that one might imagine and hope would routinely underpin public policy formulation.

There are several fundamental reasons why the ideal of systematic, rigorous research is rarely realized.

First, because of time constraints, policy officers are often prevented from devoting the long periods of concentrated attention that might be required to delve into a complex subject, absorb such literature as there is, puzzle through the outstanding questions, formulate a view and test it empirically.

Second, it is increasingly difficult for anyone, including professional researchers, to stay abreast of the literature pertinent to trade policy. This reflects increased specialization, proliferation of learned journals, the evolution of highly technical approaches to the study of economics, and exploration of trade policy issues in multiple disciplines, including most importantly economics, law and political science.

Third, bringing in a researcher to tackle the job requires itself a considerable expenditure of time in formulating the questions and to some extent working through the specific points on which answers are required in order to guide the research. If the researcher is an outside contractor, issues of funding, confidentiality etc. arise. The administrative burdens of managing the contract thus pile on top of other costs. Contractors, operating at a distance from the policy context which the research is to inform, lack the constant informal information flow and feedback that helps to guide research towards fruitful ends—this is after all an aspect of the forces that drive agglomeration, that create places like Silicon Valley.

Fourth, there is the age-old problem of control: bringing in a researcher involves giving up some measure of control over management of an issue. A free-standing research unit is thus all too often on the outside looking in, rather than having its energy directed to the most pressing problems facing the organization. By the same token, this can easily lead to a perceived irrelevance of the research unit, which drives a negative dynamic of loss of funding, of access, of status and so forth. This in turn drives talented researchers away, exacerbating the problem. In the fullness of time, such a vicious circles usually leads to a reorganization, with new management being brought in to "work out" the problems.

These various problems are not insuperable, but they are hard. Canada's past experience in these regards provides ample evidence of the potential for these problems to emerge but also demonstrates that things can get turned around.

Building a Research Program

In the Department of International Trade, research and analysis in support of policy formulation and public communication is conducted in part by the policy officers themselves with as much rigour as time permits, in part by contracted researchers and in part within a specialized research unit, the Trade and Economic Analysis Division. Its activities are most salient to the question of how to develop trade policy research and its experience is the focus of much of the following discussion.

Trade and economic research and analysis in the Trade and Economic Analysis Division can be classified into four sets of activities:

(a) Current Trade and Economic Reporting and Analysis:

- This includes monthly, quarterly and annual reports on Canada's trade and investment, related to economic developments in Canada and abroad.
- The annual report (the *Annual Report on Canada's State of Trade*), which is tabled in Parliament, has been a foundational initiative in driving the development of the trade research function. It provides the Minister with a public communications vehicle as well as an occasion to report to parliamentary colleagues. At the same time, it provides the Department with a document of record in which Canada's trade and investment performance can be related to topical issues of the year in review.
- The research division also feeds into the annual report on Canada's trade policy priorities, which is also tabled in Parliament. This report is compiled on the basis of department-wide contributions and reflects broader inter-departmental consultations.
- Ad hoc analysis of topical issues in the international economy—issues such as tracking the immediate developments following September 11th, the sharp rise of the Canadian dollar in the first half of 2003, and similar issues—provide the research group the opportunity to brief the Department's senior managers. This helps make the case for the relevance of a research unit and also helps bring economic analysis to bear as policy makers consider how to respond to breaking events.
- As part of this function, the Division maintains an extensive data set on Canada's trade and investment performance and advises Departmental officers on the use of—and how not to abuse—statistics.

(b) Economic Analysis of Trade Policy Issues

- Research output is compiled annually in the *Trade Policy Research* series and includes, alongside work conducted within the Trade and Economic Analysis Division, contributions from others within the Department and other government departments, some contracted research, and a sprinkling of contributions from well-known trade policy figures—the latter have included in the past such fixtures in the trade policy world as Jagdish Bhagwati, Gary Hufbauer, Keith Maskus and Sylvia Ostry.

- External validation is important to the credibility of a research group since it is likely to be situated in a department where most others are not likely to be able to fully appreciate the technical merits of analysis. Hence, participation by well-established figures, which is a measure of external validation, adds greatly to internal credibility.
- Research topics are in some measure driven by internal demand, subject to capacity to respond; however, ideally there would be a tighter coupling of the research agenda to the requirements of the trade policy officers—and indeed greater involvement of these officers in carrying out the research. In some measure, research is driven by external demand that makes itself felt through requests for conference participation—properly understood, such requests represent demand signals as to what issues require analysis. Requests to speak at national and international conferences also represent a form of external validation that is an important part of building internal support.

(c) *Modelling trade initiatives*

- This activity is still in its early days in the Department of International Trade. A new computable general equilibrium (CGE) model has been recently developed (see Chapter 8 for a description).
- Previous modelling efforts were conducted using the standard GTAP model: these were CGE-based studies of a possible Canada-EU Free Trade Agreement, and of the impact of fully liberalizing least developed country exports to Canada that formed the basis for Canada's Africa Initiative at the 2002 G7/8 Summit in Kananaskis.
- Such an operation is proving hard to mount and hard to sustain. CGE modelling requires very specialized skills; finding and/or training skilled individuals to run the models—and keeping those individuals in place—is difficult. Other government departments with interests in

international economic issues compete for these scarce individuals (e.g., in Canada, the Department of Finance and Industry Canada have CGE modelling capacity). A critical mass seems to be required; that can take time to put together. In the meantime patience is required.

- There is some virtue to low budgets—the challenge of seeking internal funding sets a market-like test for the research unit and a budget constraint focuses the mind on what is important. At the same time, one can take a good thing too far! To gear up the modelling function to the point where it is the last word on trade impacts on Canada requires a substantial investment.

(d) Economic analysis in support of Canada's position in international trade disputes

- Also still in a development stage, the Trade and Economic Analysis Division has been working to develop an internal economic consultancy on behalf of the Department's Trade Law Division, providing advice on economic questions that are raised in trade disputes, and on occasion developing technical input to WTO submissions.
- The most important contributions have been quantitative analysis in respect of Article 22.6 arbitrations—determining the quantum of retaliation.
- This is high stakes activity for a research unit: the work goes into an adversarial context and legitimacy is based on success—failure to produce quality work that succeeds before arbitrators could be detrimental to the future of the group. By the same token, successes build confidence; this works to expand opportunities to bring economics more fully to bear on shaping the development of arguments—including hopefully in due course at the initial panel (Article 21.5) stage.

This set of activities emerged by responding to demands that emerged from Departmental operations. Although in retrospect, it now seems like a "natural" set of complementary activities, what should be the specific elements of the program was not clear at the outset and took time to articulate and achieve. Moreover, it remains in an evolutionary mode, as a forward-looking capacity (forecasting, scenario building, working out the implications of global trends for Departmental resource allocation etc.) remains as of this writing under-developed.

There are some general lessons that are suggested by the Department's recent experience.

A research division needs clients and needs to think in terms of being an internal consultant. Potential demand usually shows up in the form of trouble. For the manager, the aggressive way to develop the research unit is to treat incoming trouble like a business. Someone with a consultant's report that is a mess, a conference to organize and seeking advice on whom to invite to speak, speaking engagements that they cannot take up, a speech that needs to be written on a subject they don't feel comfortable with, statistics that don't appear to make sense, etc. All of these people are customers. Building up a client base is just another way of insinuating a research division into operational files. However, it is a market-like way of achieving this objective, which might be contrasted with what might be termed "bureaucratic" approaches which involve sketching organizational diagrams, setting reporting lines, and issuing "top-down" instructions from more senior managers.

A trade policy research division needs one or a few "flagship" products that become its face internally with the Department, to other government departments and to the rest of the world. Proliferation of products raises the cost of search for outsiders trying to navigate through a research division's work. The Trade and Economic Analysis Division has two flagship products: *The Annual State of Trade* and *Trade Policy Research*. Together with the Department's annual publication on Canada's trade priorities, these form a suite of products with a "common look and feel" that attract regular attention from those interested in Canada's international trade and economic policy and performance.

Most importantly, a research division has to deliver quality. The key to this is to attract and keep good researchers. In this regard, nothing succeeds like success. A successful program generates a charged atmosphere that will be attractive to researchers, and will go a long way to alleviating a typical problem of housing a research centre in a government ministry, namely that career paths are designed for those with management aspirations, not research aspirations. One important way to make research positions within a government department attractive to those with research aspirations is to maintain a publications program and conference participation program that allow the individuals to build up external professional credentials. More generally, while we tend to speak of "building" a research capacity, the appropriate metaphors are probably drawn from gardening than architecture.

There are some issues that are more substantive.

First, it is said "You can't manage what you don't measure". In this regard, a trade research unit is an important client of the statistics ministry and it needs to press for better measures of the elements that go into its models—which includes voicing support for the statistics ministry in obtaining support to mount new surveys. This is particularly important in respect of services trade—indeed, anything that the research division can do to contribute to the development of better measures of services trade and trade barriers will elicit, free of charge, numerous studies by researchers who are starved for better data.

Secondly, research on international economic issues tends to separate trade from finance. This is a problem since trade practitioners assume macroeconomic equilibrium conditions. But international finance research shows that disequilibrium conditions persist: exchange rates are often far from equilibrium and usually for long times and very significant external balances can persist over the medium-term. Reduction of trade barriers laboriously negotiated over years of a trade round can be swiftly undone by overshooting exchange rates that price countries out of markets they were seeking to penetrate. Accordingly, the trade research function needs to be complemented by a more general international economic research capacity and ultimately the ability to integrate the two.

Finally, it is a useful message to underscore that trade is about domestic policy—about the optimal structure of producing the goods and services desired for consumption and investment—and ultimately about imports. Countries export in order to import; this point is not self-evident in the way that trade negotiations are organized, in which offers of domestic market access are made to elicit positive responses to requests for access to markets abroad. The apparently mercantilist framework for trade negotiations is often remarked on with bemusement by economists as a form of unreconstructed heresy. The reality is that this matters little; indeed, if this framework helps trade negotiators to expand a country's budget to purchase imports, all the better. But for the general population, the fact that the reason for engaging in trade is to import needs constant emphasis.

In Canada, the messaging on trade policy emphasizes the gains to be made in terms of better access to foreign markets for Canadian exports, but also the competitive stimulus from imports and the benefits of two-way investment flows.[19] Maintaining this balance can be a challenge, of course, when discussing objectives in trade negotiations since the formal objectives are, for the most part, set in terms of market access abroad. Accordingly, supplementary information, ideally supported by rigorous analysis, is needed to emphasize the benefits of imports (greater product variety, access to technology embodied in goods, access to specialized goods and services that might not be readily available in the domestic market, etc.).

Communicating Research Findings

The most significant issue faced in communicating the results of research—in particular with regard to quantitative research—lies in the sensitivity of the results to the assumptions and modelling techniques used to generate them. In a survey of results of modelling exercises to identify the impact of services trade liberalization on Canada, the results differed wildly—from massive positive gains to small negative impacts.[20] Needless to say, the policy officers were less than impressed. This is a substantive problem facing the economics profession that can be resolved only through better measurement of trade barriers that are subject to liberalization and improved models that better capture real world dynamics.

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[19] See "Canada's Trade Policy Strategy" (Ottawa: Department of Foreign Affairs and International Trade, 2003); available online at http://www.dfait-maeci.gc.ca/tna-nac/trade_policy-en.asp.

[20] These results are reported in Zhiqi Chen and Lawrence Schembri, "Measuring the Barriers to Trade In Services: Literature and Methodologies", in John M. Curtis and Dan Ciuriak (Eds.) *Trade Policy Research 2002*, op cit. at pp. 242-243

Since the numbers in trade studies rarely speak for themselves, it is detrimental to the credibility of modelling to allow the numbers to dominate; it is essential that the accompanying *qualitative* analysis be first rate. Importantly for the services trade research noted above, some important lessons were actually learned—understanding the linkages in the models that generated the huge differences alerts policy makers to real life uncertainties in these domains (e.g., the response of investment inflows to liberalization of particular services sectors and the impact of liberalization of producer services on efficiency in goods production). While the numbers *per se* were unusable, the insights from the modelling exercise were valuable.

A second problem with quantitative analysis is that it has proved hard to generate impressive numbers for gains from trade in general equilibrium models—this is a problem, of course, for those who are looking for impressive numbers to support policies. This difficulty is compounded by results such as those recently published by Andrew Rose.[21] Using a conventional gravity model, Rose found that for 98 countries that joined the GATT/WTO between 1950 and 1998, membership in the WTO had overall no statistically significant impact on the intensity of trade between two pairs of countries (at least since the 1970s). Such results create a stir in trade ministries—"How can we respond?" is the sort of question that tends to get raised. One way is to double the elasticities in the CGE models on the article of faith that the gains *must* be there. However, there is a slippery slope in this approach.

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[21] See Andrew K. Rose, "Do We Really Know That the WTO Increases Trade?" Working Paper 9273, http://www.nber.org/papers/w9273, National Bureau of Economic Research, October 2002.

To some extent, part of this problem in what has been termed the era of "post-modern trade policy"[22] is that the already highly open economies face diminishing returns to trade liberalization. This was unavoidable—through eight GATT rounds, the easy areas for liberalization had already been mined; remaining areas (services, agriculture, textiles/footwear, the hard wiring of differing socio-economic structures) pose much tougher problems. And, even as the pain of liberalization was rising, the additional gains from liberalization of already highly open economies were declining. Hence the rise in difficulty in gaining support for trade liberalization in the political centre—Cabinet and Legislature—let alone the political periphery, the non-governmental organizations. The difficulty in identifying benefits to the developing countries from the Uruguay Round—and from WTO membership more generally as Rose's paper seems to show—has compounded this by highlighting the uneven distribution of gains in the past.

In this context, the question must be asked: what is the communications issue and what is the message? The credible analytical bottom line on trade liberalization in today's context—economically, socio-economically and geo-politically—should be front and centre in communications. Dealing with the issue of expectations from further liberalization has been a thread that has run through the first three volumes of *Trade Policy Research*.[23]

A third significant issue lies in translating the often complex results of research into language that is accessible to the informed lay person, but is not "dumbed down" to the point of caricature. Notionally, research products aimed at the general public might be pitched to meet the level of assumed knowledge of readers of *The Economist* magazine, except perhaps in writing of the sort included in the *Trade Policy Research* series which aims to participate in professional discourse—albeit at the less technical end of the spectrum.

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[22] See William A. Dymond and Michael M. Hart, "Post-Modern Trade Policy: Reflections on the Challenges to Multilateral Trade Negotiations after Seattle", *Journal of World Trade* 34(3): 21-38, 2000.

[23] See for example, John M. Curtis and Dan Ciuriak, "The Nuanced Case for the Doha Round", in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2002* (Ottawa: Department of Foreign Affairs and International Trade, May 2002).

A fourth point that can be an issue for researchers operating within government lies in communicating negative results. It is essential that objectivity be maintained but at the same time anything resembling sensationalism needs to be avoided. If research and analysis is to serve as the basis for policy development, it must almost by definition challenge the existing policy and identify areas where improvements can be made. There is no general answer to this communications issue since much depends on the operating culture of the organization and the country. In Canada, we are fortunate in that individual officers in the Department of International Trade and other government departments are able to publish under their own names in professional journals—and those with an interest in trade policy are encouraged to do so in *Trade Policy Research*. Responsibility resides with the editors and the usual disclaimers apply for signed articles written in a personal capacity by officers of government departments—the contents are the responsibility of the authors and not to be attributed to the government. A difference in analytical results on the same issue obtained by different authors is not therefore an issue; indeed, in some ways it is an advantage as it underscores the active debate on many aspects of trade policy.

Conclusions

Trade policy research is a difficult area. The controversy surrounding globalization and the many sensitive nerves that global trade rules have touched as they reach inside borders have generated a confrontational atmosphere between critics of global economic policies and those within the trade policy community. Further, trade negotiations are under way and individual countries have staked out positions. Research and analysis in this area thus raises many sensitivities.

Yet, it seems self-evident that any trade ministry requires a professional economics research unit—to explain the actual results of trade, to provide rigorous underpinnings for both policy development and communication, and to support the development of positions in trade disputes (which are inevitably partly about economics as well as about trade law). Transparency and consultation are key to policy formulation in a democracy and these efforts are best built on solid analysis. To be able to contribute in these areas, members of a research division also need to be actively engaged with the wider research community—by publishing, participating actively at conferences and so forth.

Canada's experience is largely encouraging in that these elements can be put together; at the same time, the contribution of rigorous research and analysis is still in developmental mode, particularly in terms of building the modelling capacity, and many issues continue to be debated concerning how to fit a research group into an operational department.

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Kukucha, Christopher, (2003) "Domestic Politics and Canadian Foreign Trade Policy: Intrusive Interdependence, the WTO and the NAFTA," *Canadian Foreign Policy Journal* 10:2 (Winter 2003), 59-88.

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Appendices

Appendix 1: The Standing Committee on Foreign Affairs and International Trade

The Standing Committee on Foreign Affairs and International Trade (SCFAIT) is made up of 18 Members of Parliament, drawn from all parties. The Committee meets several times a week to study matters referred to it, for the most part by special order of the government. Individuals and groups appear before the Committee to give their opinions on proposed legislative measures and government policies. The Committee then provides its recommendations to the House of Commons. The Committee also receives foreign parliamentary delegations and international delegations.

The parliamentary process assigns issues related to the Department of International Trade, the Department of Foreign Affairs and the Canadian International Development Agency (CIDA) to the Standing Committee on Foreign Affairs and International Trade. In particular, the Committee is mandated to study, analyze and report on:

- legislation relating to these departments, as well as the objectives and implementation of their programs and policies;
- the immediate and medium and long-term expenditure plans and the effectiveness of their implementation by departments; and
- the relative success of the department, measured by the results obtained as compared with its stated objectives, as well as other matters relating to the mandate, management, organization or operation of the department as the Committee deems fit.

In practice, the Committee, directly and through its sub-committees (the Sub-Committee on Human Rights and International Development, the Sub-Committee on International Trade, Trade Disputes and Investment, and the Subcommittee on Agenda and Procedure) discusses a wide range of topics, from trade disputes, bilateral/multilateral negotiations, international economic interests and policy relations. Given Canada's economic orientation towards the United States, questions directed to the Committee tend to address the management of the Canada-US relationship. Some examples of issues recently examined by the Committee include:

- Export Development Act
- Canada and the G8 Agenda for the 2002 Summit: Outline of Key Issues and Questions for Public Discussion
- North American Relationship Study
- Consideration of the Eleventh Report of the Sub-committee on International Trade, Trade Disputes and Investment (WTO)
- Hearings on the Summit of the Americas
- Meeting with the European Parliament Delegation for Relations with Canada

Source:
For general background on the operations of parliamentary committees in Canada, see:< http://www.parl.gc.ca/committees352/english_intro.html>; for materials on the operations of SCFAIT see <http://www.parl.gc.ca/cgi-bin/committees352/english_committee.pl?fore>.

Appendix 2: Sectoral Advisory Groups on International Trade (SAGITs)

SAGITs were originally established in 1986 to provide advice to the Minister for International Trade on federal government policy pertaining to trade. Central to the SAGIT process is the open exchange of ideas and information between the SAGIT members and government. There are currently twelve active SAGITs representing various industry sectors.

- Agriculture, Food and Beverage SAGIT
- Apparel and Footwear SAGIT
- Cultural Industries SAGIT
- Energy, Chemicals and Plastics SAGIT
- Environmental SAGIT
- Fish and Sea Products SAGIT
- Forest Products SAGIT
- Information Technologies SAGIT
- Medical and Health Care Products and Services SAGIT
- Mining, Metals and Minerals SAGIT
- Services SAGIT
- Textiles, Fur and Leather SAGIT

Each SAGIT is comprised of senior business executives with some representation from industry associations, labour/environment and academia. Members serve in their individual capacities and not as representatives of specific entities or interest groups. Members are appointed, for a two year (renewable) term by the Minister for International Trade, to whom the SAGITs report. The Agriculture SAGIT reports to both the Minister for International Trade and the Minister of Agriculture and Agri-Food. Each SAGIT may meet as often as three to four times annually. Members serve without remuneration.

The SAGIT structure is supported by advisors from the Department of International Trade's Trade Consultations and Liaison Planning Division.

Source: "Sectoral Advisory Groups on International Trade (SAGITs)" available online at < http://www.dfait-maeci.gc.ca/tna-nac/sagit-en.asp>

Appendix 3: Recent Participants in Multi-Stakeholders Consultations

Canadian Association for Community Living
Alliance of Manufacturers and Exporters of Canada.
Association of Canadian Community Colleges
Association of Consulting Engineers of Canada
Association of Universities and Colleges of Canada (AUCC)
Association québécoise des organismes de coopération internationale
Business Council on National Issues
Canadian Apparel Manufacturers Institute
Canadian Bankers Association
Canadian Centre for Policy Alternatives
Canadian Chamber of Commerce
Canadian Conference of Catholic Bishops
Canadian Conference of the Arts
Canadian Council for Int'l Business
Canadian Council for Int'l Cooperation
Canadian Council for the Americas
Canadian Environmental Law Association
Canadian Federation of Agriculture, The
Canadian Federation of Students
Canadian Human Rights Commission
Canadian Institute for Environmental Law and Policy
Canadian Labour Congress (CLC)
Canadian Manufacturers & Exporters
Canadian Pulp & Paper
Canadian Society for International Health
Canadian Teachers Federation
Canadian Wheat Board
Centre for Innovation in Corporate Responsibility
Centre for Trade Policy and Law (CTPL), University of Ottawa
Coalition for Cultural Diversity
Confédération des Syndicats nationaux
Conference Board of Canada, the
Congress of Aboriginal Peoples
Conseil canadien pour les Amériques
Conseil du Patronat du Québec
Conseil international de l'action sociale
Consumers' Association of Canada
Council of Canadians

Dairy Farmers of Canada
Dalhousie University
Development and Peace
Ekos Research Associates Inc.
Fédération des travailleuses et travailleurs du Québec (FTQ)
Federation of Canadian Municipalities
Canadian Foundation for the Americas
Forest Products Association of Canada
Grey, Clark, Shih and Associates, Limited
Human Rights Research & Education Centre, University of Ottawa
International Centre for Human Rights and Democratic Development
International Council for Social Welfare
International Development Research Centre (IDRC)
Int'l Institute for Sustainable Development
Inuit Tapirisat of Canada (ITC)
Manufacturiers et exportateurs du Québec
Metis National Council
National Council of Women of Canada
North South Institute
Option Consommateurs
Oxfam Canada
Physicians for a Smoke-Free Canada
Polaris Institute
Public Interest Advocacy Centre
Sierra Club
Teleglobe Inc.
The Mining Association of Canada
Trade Facilitation Office Canada
Transparency International Canada
Union des producteurs agricoles
University McGill, Faculty of Law
University of Calgary
University of Ottawa
UQAM - Université du Québec à Montréal
World Federalists of Canada (WFC)
World Vision Canada & Working Group on Children & Armed Conflict
World Wildlife Fund Canada

Source: Compiled from "Multistakeholder Consultations" website at http://www.dfait-maeci.gc.ca/tna-nac/Consult4-en.asp

Appendix 4: Public Opinion Research – Survey

Since 1999, surveys have been conducted to determine Canadians' attitudes towards international trade. A national random sample of over 1,200 Canadians is chosen. Questions are posed in six subject areas, with answers graded on a 7-point scale, ranging from a score of low (1-3) to high (5-7). The six subject areas are as follows:

- Broad Environment
- Benefits of Trade
- Government Role
- Canada - U.S. Relations
- Developing Countries
- Media Consumption

The results of these surveys are available online, with the more recent surveys tracking the current responses to previous years' responses. Some highlights of the past two surveys are:

- 2003 - Canadian Attitudes Toward International Trade: The 2003 survey indicates that the majority of Canadians want to see increased services and advice provided to exporters and are open to pursuing more trade agreements with other countries.
- 2002 - International Trade Survey - The Views of Canadians: The 2002 annual survey on international trade shows that the majority of Canadians feel that international trade has made a significant contribution to the growth of the Canadian economy and to job creation over the past ten years. They also believe that Canada can do more to help developing countries.

These surveys provide the Department of International Trade with feedback, which then informs the outreach and consultations process.

Source: For background and up-dates see : http://www.dfait-maeci.gc.ca/tna-nac/Consult6-en.asp

Appendix 5: On-line Consultations

The Department of International Trade encourages Canadians to send their comments on Canada's trade policy agenda, on an ongoing basis through its online consultations program. Examples of the types of issues that are the subject of current and past online consultations on the Department's website are as follows:

FTAA
- Consultations on Government Procurement Market Access Negotiations
- Initial Environmental Assessment of the Free Trade Area of the Americas (FTAA) Negotiations
- Invitation to submit comments on market access negotiations for agricultural and non-agricultural products

Canada-European Union - Proposed Trade and Investment Enhancement Agreement

Market Access Priorities Report - 2003 (CIMAP)

The Trade and Development Roundtables: June and July 2002

Initial Environmental Assessment of the new World Trade Organization (WTO) Negotiations

Canada-Andean Countries - Free Trade Discussions

Canada-Dominican Republic - Free Trade Discussions

WTO: "Doha Round" - Invitation to submit comments on market access for non-agricultural products

Consultation Paper on WTO Subsidies and Trade Remedies Negotiations

Canadians' Views on Trade with Least Developed Countries

Canada-Chile Free Trade Agreement (CCFTA) - Proposal for CCFTA Rules of Origin Changes

Canada-Israel Free Trade Agreement (CIFTA) - Proposal for CIFTA Rules of Origin Changes

Canada - CARICOM Free Trade Agreement Negotiations

Canada-Israel Free Trade Agreement - Proposal to Amend de minimis Provisions and to Implement Transshipment and Minor Processing Provisions

2001 - WTO Consultations (Ministerial Meeting - Doha, Qatar)

A Canadian Perspective on the Precautionary Approach/Principle

Open Invitation to Civil Society in FTAA Participating Countries - November, 2001

Requests for Accelerated Elimination of Tariffs under the NAFTA (Gazette Notice - September 15, 2001)

Consultations on Trade in Services Negotiations

Canada - Singapore Free Trade Negotiations

WTO - Transparency

OECD Agreement on the Environmental Review of Officially Supported Export Credits

Canada/Brazil WTO Panels- Aircraft - Possible Retaliatory Action

WTO Services Negotiations - Virtual Consultations with Services Exporters

Framework for the Environmental Assessment of Trade Negotiations

Report of the Second Triennial Review of the WTO Technical Barriers to Trade Agreement

Canada-Costa Rica Free Trade Agreement FTAA and WTO Negotiations

1999 - WTO and FTAA Consultations (Seattle and Toronto Ministerial Meetings)

Source: See consultations listed at the website "Its Your Turn", at http://www.dfait-maeci.gc.ca/tna-nac/consult2-en.asp

Appendix 6: The Canada Gazette

The Canada Gazette is the official newspaper of the Government of Canada and can be used by the Department of Foreign Affairs and International Trade to communicate developments to the public. It is published in three parts, each of which serves a different purpose in communicating information to the public.

Published every Saturday, Part I contains all public notices, official appointments and proposed regulations from the Government as well as miscellaneous public notices from the private sector that are required by a federal statute or regulation to be published.

Part I is important for the public because it notifies Canadians of proposed regulations and provides them a chance to submit comments to the responsible government departments and agencies before the regulations are enacted. The names and coordinates of the contact persons appear within the proposed regulations.

Published every second Wednesday, Part II contains all regulations that are enacted as well as other classes of statutory instruments such as orders in council, orders and proclamations. Only government departments and agencies publish in Part II. The Privy Council Office (PCO) coordinates the regulations and other documents that are published in Part II. PCO sends the material for publication in Part II to the Canada Gazette Directorate for production and gives final approval of the publication.

Published as soon as is reasonably practicable after Royal Assent, Part III contains the most recent acts of Parliament and their enactment proclamations. The Department of Justice determines the publication date of each issue of Part III.

Source: For background consult the Canada Gazette website at:
http://canadagazette.gc.ca/index-e.html

The International Trade Canada Trade Model, Version 1.0

Evangelia Papadaki, Marcel Mérette, Yu Lan and Jorge Hernández*

Introduction

Rigorous quantitative analysis is increasingly being applied to complement intuitive assessments, reasoning and judgement, all of which are ultimately based on economic theory and indirect empirical evidence, that along with input from consultations have traditionally underpinned trade policy formulation.

Economic theory helps us to understand conceptually the linkages between trade, income generation, employment, and the effect of government policies. For instance, theory predicts that reducing restrictive trade policies fosters trade, increases economic efficiency by reallocating resources from the less productive to more productive sectors and benefits the consumer by reducing the price of imported goods—the essence of the argument in favour of freer trade and more open markets.

To test these theoretical expectations and to get a sense of the magnitude of the economic effects of changes in trade policies in a given context, such as Canada with its particular industrial and regional economic structure (itself a function of Canada's geographic location, its comparative advantages, and its historic ties), an applied economic model that reflects those specific realities is required.

To meet the demand for quantitative trade analysis in an institutional setting such as Canada's Department of International Trade (ITCan)—that is to say, to provide rigorous underpinnings for trade policy development—requires a model that can be flexibly adapted to address the myriad policy issues the Department faces in the course of multilateral, regional/bilateral and/or sectoral negotiations/policy discussions, managing trade relations and disputes, and bringing international trade and investment considerations to bear in Canada's domestic economic policy formulation.

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*Evangelia Papadaki is a senior trade policy analyst with Trade and Economic Analysis (EET), Department of International Trade Canada (ITCan). Yu Lan and Jorge Hernández are junior economists on contract by EET. Marcel Mérette is an associate professor at the University of Ottawa. The views expressed in this report are entirely those of the authors and do not necessarily reflect those of ITCan.

This chapter describes the first quantitative trade model that has been developed by ITCan in collaboration with the University of Ottawa to help meet this need. The following section reviews the general considerations that guide the choice of modelling approach. The subsequent section sets out the specifications of the ITCan model, describes the data and calibration of the model, and provides its key parameters. The final section sets out some concluding thoughts concerning the type of policy questions that the initial form of the model will be best suited to address, and how the model might be developed to address a wider set of policy questions.

Choosing a modelling approach

The essence of quantitative economic models is that they combine a theoretical view of the important links and transmission mechanisms in the economy with real observations (data) summarizing what is known about these links and mechanisms. Models are simple representations of the real world. They focus on the driving elements and interactions within the economy and therefore abstract from many of the complexities of the real world. Accordingly, they do not substitute for—but rather complement—intuition, reasoning, expertise and political judgement.

The differences in models can be thought of in terms of the types of interactions that they can capture and those they cannot. For instance, multi-period models based on annual or quarterly data can illustrate the evolution of a set of economic variables over time. In policy analysis, such models are typically used to model the economy, showing for example the impact on growth, employment etc. of changes in government fiscal and monetary policy. In trade analysis, such models can show the aggregate behaviour of imports and exports in response to changed macroeconomic conditions and exchange rate shifts, illustrating such issues as "leads" and "lags" in the response of trade flows. Such models shed light on important issues of external adjustment such as so-called "j-curves" (which reflect the empirically observed tendency of a trade balance to deteriorate after an exchange rate depreciation before improving as would be expected from theory). Such models, however, sacrifice information on the industrial structure of the economy and necessarily take the external context for the economy as fixed.[1]

So-called "gravity models" of trade bring out a different dimension: these models explain the pattern of global trade at a given point in time based on economic geography: the proximity of countries to each other, the size of their respective economies, their relative per capita incomes, whether they share a common border, whether they speak the same language, whether they have historic colonial ties, whether they are parties to a free trade agreement and so forth. Such models are highly effective in explaining the intensity of trade relations with different economic partners but necessarily sacrifice information on the sectoral structure of trade, the interaction of trade with the domestic economy, and the dynamics of trade flows over time.

Partial equilibrium models simulate the impact of hypothetical policy changes on one sector in particular[2]. These models can bring to bear detailed and sophisticated information on the particular sector of interest but take the rest of the economy as fixed and therefore sacrifice information on the feedback to the sector of interest from its interactions with the rest of the national and global economy.

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[1] An attempt to overcome the latter constraint by linking various national econometric models is made in the UN Project Link. For a description and history of this project see: Lawrence R. Klein, "Project Link", *United Nations Chronicle*, Online Edition, Vol. XXXVI, No. 4, 1999; http://www.un.org/Pubs/chronicle/1999/issue4/0499p73.htm

[2] Widely used and accessible partial equilibrium models can be found at the UNCTAD, WTO International Trade Center: http://www.intracen.org/

General equilibrium models have been the most broadly used for trade policy analysis[3]. Computable general equilibrium (CGE) models are numerical representations of economic theory and intuition and explicitly describe the structure of a single economy as in single-country CGE models or a number of countries as in multi-country CGE models. In particular, all CGE models are characterized by an input-output structure that provides the interlinkages of industries in a value added chain from primary goods, to higher stages of intermediate processing, to the final assembly of goods and services for consumption and/or investment.

CGE models capture these linkages by modelling the decision-making processes of the firm, the consumer, as well as that of other economic agents and institutions in the economy, depending on the specificity and application of the model. Trade results from these decision-making processes. In "neo-classical" trade models, this occurs because consumers, producers and other users of goods and services consider products from different regions to be imperfect substitutes with each other and with domestic products. The principle of national product differentiation is known as the Armington assumption.[4]

CGE models calculate the impact of hypothetical policy changes on a variety of economic variables of interest to policy makers, including:

- the economic welfare of the economies modelled;
- productive efficiency and consumer gains;
- distributional consequences in terms of returns to labour and capital;

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[3] Widely used and accessible multi-regional, multi-sectoral CGE models are:

- *Global Trade Analysis Project* (GTAP):http://www.gtap.agecon.purdue.edu/
- *Michigan Model of World Production and Trade*: http://www.fordschool.umich.edu/rsie/model/description.html
- *World Scan Dynamic Model of the World* of the Netherlands Bureau of Economic Policy analysis (CPB): http://www.cpb.nl/nl/pub/bijzonder/20/bijz20_c.pdf
- *Harrison/Rutherford/Tarr Multi-Regional Global Trade Model*: http://dmsweb.badm.sc.edu/Glenn/ur_pub.htm

[4] Paul S Armington (1969), "A Theory of Demand for Products Distinguished by Place of Production", *International Monetary Fund Staff Papers*, 16, 159-176

- the re-allocation of resources among industries; and
- general impacts on trade flows, production, consumption, investment, employment, revenue, consumer and producer prices, terms of trade and productivity.

Importantly, CGE models capture second-round effects of hypothetical policy changes that might escape qualitative intuitive analysis. For instance, a reduction in trade protection might initially increase the imports of certain sectors but secondary effects such as income changes and redistribution of resources might lead to a reduction in imports in some of these sectors.

CGE models have accordingly been most widely used to analyze the impact of hypothetical policy changes that are large in scope and have a broad impact on the structure of the economy, such as trade liberalization and policies geared towards international economic integration. By quantifying for policymakers the benefits and costs of proposed initiatives, and in particular by identifying who benefits and who losses and by how much, model simulations also shed light on the supporting policy adjustments required as part of a broader economic policy framework that includes trade liberalization as an important constituent part. Further, considerable operational advantage of CGE models is that they are extremely flexible (though resource intensive) and with appropriate modification in the characteristics of the model and the data set can handle a variety of issues ranging from trade in goods and services, taxation, debt issues, foreign direct investment and intellectual property to energy and environmental issues.

Results derived from CGE models like all models theoretical and applied, are sensitive to how modellers chose to specify the world in their model. CGE results depend on the specification of the model, the database and the assumptions about the key parameters of the model. Modifying some of these specifications can result in important changes in the results. Below, we briefly discuss some of the more widely used CGE model assumptions and their implications in terms of experimental results.

Perfectly competitive versus imperfectly competitive markets

Many CGE models, such as the first ITCan model, make the simplifying assumption of perfectly competitive markets. In such models, the benefits from trade liberalization reflect efficiency gains from greater international specialization of production.

The assumption of perfect competition is realistic for the primary sectors of the economy. However, the manufacturing sectors of industrialized countries tend to operate in imperfectly competitive markets in which firms can lower costs by expanding the scale of their production and also have some pricing power due to factors such as brand recognition, patent protection etc. Liberalizing trade in imperfectly competitive markets expands the gains from trade since, in addition to allowing realization of gains from specialization, it tends to reduce pricing power and to reduce costs at the firm level. A number of more recent CGE models have introduced increasing returns to scale and imperfect or monopolistic competition in product markets to reflect these realities and to more fully reflect the gains from trade.

In monopolistically competitive models, the firm perceives a constant elasticity demand curve on the basis of which it chooses a mark-up of price over cost that maximizes profits. In models where there is product differentiation at the firm level,[5] the firm also chooses the profit maximizing number of product lines. Reciprocal tariff reductions subject the domestic firm to foreign competition which reduces its capacity to mark-up prices, while also allowing access to larger foreign markets which enables it to achieve additional efficiency gains as it move down its average cost curve, producing larger outputs at lower average costs. As noted, these effects expand the scope for consumer gains compared to perfectly competitive markets.

In models with firm-level product differentiation, trade liberalization can also reduce the number of domestic firms through rationalization. This in turn reduces the total number of domestic and foreign products offered to consumers, offsetting to some extent the welfare gains from greater competition and lower costs.

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[5] Wilfred J Ethier, (1982), "National and International Returns to Scale in the Modern Theory of International Trade", *American Economic Review*, 72, 389-405. Avinash K. Dixit and Joseph E Stiglitz (1977). "Monopolistic Competition and Optimum Product Diversity", *American Economic Review*, 67, 297-308.

Dynamic versus static models

General equilibrium models take their name from the assumption of equilibrium conditions--that is, that factors of production are fully utilized and optimally allocated given societal preferences and the setting of policy parameters (e.g., tariff rates). The changes in the model induced by reciprocal tariff cuts represent accordingly a shift from one equilibrium to another in which factors of production remain fully utilized but are now allocated somewhat differently and consumers have re-allocated their expenditures to take advantage of the changes in relative prices of goods and services induced by trade liberalization. The income gains from such a re-allocation of productive resources are referred to as "static" gains. CGE models that capture only these effects are thus referred to as "static" models.

Investment in static models is usually treated as a component of final demand, and aggregate capital is usually fixed, allowing for changes only in sectoral allocation of capital stock, but not in the total capital stock available. Economic theory, however, points out that incentives for investment and innovation are enhanced under more liberal trade conditions; this should lead to capital accumulation (including increased "human capital" formation as returns to specialized skills rise) and more innovation. CGE models that attempt to capture these "dynamic" impacts by allowing for capital accumulation are thus referred to as "dynamic" models. Formally in these models, consumers optimize their savings-expenditure decisions not only across goods and services but also over time; firms meanwhile optimize the returns to the firm over time (e.g., by maximizing the present value of future income flows).

Introducing dynamic effects into a CGE model will usually increase the estimated gains from trade liberalization because of the additional boost the economy receives from the investment response to liberalization that is not captured in static models. An additional important reason to incorporate dynamic features in a CGE model is to demonstrate the differences between tariff reductions on consumer versus investment goods.

The main disadvantage of dynamic models however is that they are significantly more complicated; the modeller thus has to forgo the detail sectoral and regional detail that the less complex static models can afford.

Closure assumptions

Several other important features of CGE models can have an important influence on the results of model simulations. Factors of production might be allowed to move between sectors and/or regions--or not. The price of imports and exports can be fixed (the usual assumption for "small" countries that are considered "price takers" in international markets) or endogenously determined (the assumption for "large" countries which can influence international prices). The allocation of savings and investment might be fixed according to pre-set rules or endogenously determined within the model. Specific rules must be set to allocate income generated by tariffs and/or /expenditures related to subsidies and to offset the impacts of changes in these regards on government revenues and expenditures (i.e., tariff cuts are usually modelled as revenue neutral, which requires an offsetting tax increase, usually a lump-sum tax on consumers)

These assumptions are usually referred to as "closure" rules. Mathematically, closure implies that the system of equations in the CGE model is soluble which implies that the number of endogenous variables has to be equal to the number of independent equations. For the modeller, closure involves the choice of which variables are going to be endogenous and which are exogenous and this from a mathematical point of view can be arbitrary. From an economic point of view, however, the choice reflects the modeller's assumptions about the structure of the economy. These choices determine how a particular CGE model works and consequently influence the measured effect of any hypothetical policy change in model simulations. To reflect the range of outcomes depending on the "closure" rules modellers will sometimes provide results under different assumptions on the closure of the model.

Specification of the ITCan CGE model, Version 1.0

The CGE model recently developed at the Department of International Trade (ITCan) in collaboration with the University of Ottawa is, in its current state, standard in its general approach. It is a static model featuring perfect competition, constant returns to scale and national product differentiation. The model and the database that supports it have been developed to address, in the first instance, issues of greater economic integration with the United states, such as a common external tariff, elimination of the rules of origin provisions of NAFTA, reduction in "unobserved trade costs" resulting from, *inter alia*, administrative costs related to customs control and costs arising from differences in standards and regulations between the two countries. Thus, the major effort has been allocated to the collection of data for both the USA and Canada to model the industrial structure of the two economies as fully as possible.

A unique feature of the model is that it disaggregates Canada into six regions. Canada's experience has demonstrated that free trade agreements can have differential effects at the national and provincial trade. Some recent econometric studies have shown, for example, that the Canada-US free trade agreement has diverted East-West inter-provincial trade to North-South state-province trade.[6] A CGE model with regional specification enables us to assess the impact of hypothetical policy changes not only on inter-provincial flows, but also on the industrial structure, revenue and welfare of the particular provinces or regions of Canada: Atlantic, Quebec, Ontario, Prairies (including the Northwest Territories and Nunavut), Alberta, and British Columbia (including the Yukon).

The theoretical framework of the model

The model consists of a multi-region, multi-sector applied general equilibrium model with perfectly competitive markets and constant returns to scale. The regions of the model currently consist of six Canadian regions, the United States, and the rest of the world.

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[6] John F. Helliwell, Frank C. Lee, and Hans Messinger. 1999. "Perspectives on North American Free Trade: Effects of the Canada-United States Free Trade Agreement on Inter-provincial Trade". Industry Canada Research Publications Program. Paper No 5. April. Also see Courchene and Telmer (1988)

In the model we first define the different commodity sets. Sectors of activity are identified by *s* and *t*, with *S* representing the set of all industries so that *s*, *t* =1,..., *W* where *W* is the set that comprises the six Canadian regions, the United States (USA) and the Rest of the World (ROW). Regions are identified by indices *i* and *j*. In a multicountry, multisector framework, it is necessary to keep track of trade flows by their geographical and sectoral origin and destination. Thus, a subscript *isjt* indicates a flow originated in sector *s* of country *i* with industry *t* of country *j* as recipient. Since it will be necessary more than once to aggregate variables with respect to a particular subscript, to avoid unnecessary proliferation of symbols, occasionally we substitute a dot for the subscript on which aggregation has been performed; for instance, $c_{.si}$ is an aggregate of c_{jsi} with respect to the first subscript.

Households

Final consumption decisions in each region are made by a representative household (consumer), which considers products of industries from different countries as imperfect substitutes [Armington (1969)] The household's preferences are given by a log-linear transformation of a Cobb-Douglas utility function

$$U_i = \sum_{s\in S} \rho_{si} \log\left(c_{.si}\right) \quad \text{where} \quad \sum_{s\in S} \rho_{si} = 1 \qquad (1)$$

whereas the consumer's preference between domestic and foreign origin of a given good s is given by a CES function

$$c_{.si} = \left(\sum_{j\in W} \delta_{jsi} c_{jsi}^{(\sigma_{si}-1)/\sigma_{si}} \right)^{\frac{\sigma_{si}}{\sigma_{si}-1}} \qquad (2)$$

where c_{jsi} is the consumption in region *i* of goods *s* produced in region *j* , $c_{.si}$ is the composite of domestic and imported goods, δ_{jsi} are consumption share parameters in region *i* of goods *s* produced in region *j* , and σ_{si} are the Armington elasticities of substitution for consumption in region *i* for good *s* .

In fact, consumption decisions are made at two levels. At the first level, the consumer chooses the optimal amount of a composite good $c_{.si}$ given constant expenditure shares (ρ_{si}). At the second level the consumer chooses the optimal composition of the composite goods in terms of geographic origin (Armington specification). Final demands c_{jsi} are given by maximization of (1) subject to (2) and to the consumer's budget constraint, that is to say, the sum of wage earnings, capital rental and the proceeds of tariff revenues, distributed as a lump sum transfer from the government.

$$Y_i = \sum_{j\in W}\sum_{s\in S}\left(1+\tau_{jsi}\right)p_{jsi}c_{jsi}$$

$$= \sum_{s\in S}\omega_i L_{is} + \sum_{s\in S} r_i K_{is} + \sum_{j\in W}\sum_{s\in S}\tau_{jsi}\, p_{jsi}c_{jsi} \qquad (3)$$

where p_{jsi} denotes the price in region *i* of goods *s* produced in region *j* and L_{is}, K_{is} labour and capital supply in region *i* of sectors *s*, respectively.

In this formulation it is assumed that both capital and labour are mobile between sectors but not between regions.

Firms

Each region is characterized by perfectly competitive industrial sectors. Demand for capital, labour and intermediate inputs by producers result from minimization of variable unit costs v_{is}

$$v_{is}Q_{is} = \sum_{j\in W}\sum_{t\in S}\left(1+\tau_{jti}\right)p_{jti}x_{jtis} + \omega_i L_{is} + r_i K_{is} \qquad (4)$$

subject to a Cobb Douglas production function

$$\log(Q_{is}) = \alpha_{L_{is}} \log(L_{is}) + \alpha_{K_{is}} \log(K_{is}) + \sum_{t\in S} \alpha_{tis} \log(x_{.tis}) \quad (5)$$

where

$$x_{.tis} = \left(\sum_{j\in W} \beta_{jtis} x_{jtis}^{(\sigma_{si}-1)/\sigma_{si}} \right)^{\frac{\sigma_{si}}{\sigma_{si}-1}} \quad (6)$$

are composite intermediate inputs in terms of geographical origin, x_{jtis} is the amount of intermediate goods purchased by sector *s* of region *i* from sector *t* from of region *j*, and p_{jti} is the price of goods *t* sold by country *j* to country *i* , and σ_{si} is the elasticity of substitution of sector *s* in country *i* (as with households, firms consider intermediate inputs from different regions as imperfect substitutes).

To guarantee constant return to scale, homogeneity of degree one of the unit costs in prices, we set

$$\alpha_{L_{is}} + \alpha_{K_{is}} + \sum_{t\in S} \alpha_{tis} = 1 \quad (7)$$

where α and β are share parameters and $\beta_{jtis} = 0, \forall j \neq i$ if *t* is non-tradable. Profit maximization, in this perfect competitive setting, implies prices equal marginal cost.

$$p_{is} = v_{is} \quad (8)$$

Equilibrium conditions

There are two equilibrium conditions in the model. First, in each region, demand for primary factors must equal their supply. Second, supply for goods and services equals its demand in each market (*i,s*). The Rest of the World (ROW) rental rate of capital is the numeraire.

Model mechanisms

In this model, a change in tariff structure following from a hypothetical policy change such as external tariff harmonization (or customs union) between the two countries will lead to a change in relative prices which will in turn affect consumption and production demand of both final and intermediate goods.

Dataset and Calibration procedure

The base year is 1999. The current model consists of eight regions, six Canadian regions, the USA, whereas the rest of the world economies are aggregated as one region the ROW. The six Canadian regions consist of:

(i) Atlantic Canada, which comprises Newfoundland, Prince Edward Island, Nova Scotia and New Brunswick.
(ii) Québec.
(iii) Ontario.
(iv) The Prairies, which comprises Manitoba, Saskatchewan, the North West Territories and Nunavut.
(v) Alberta.
(vi) British Columbia, which comprises British Columbia itself and the Yukon.

The fifty-five commodities, level S, from the trade flow data were mapped into 24 sectors. The sectors, with the elasticities of substitution used in the model, are given in Table 1 in the appendix.

Data requirements for the model consist of nominal bilateral (international and inter-regional) trade flows; national accounts data (consumption demand by sector, labour and capital earnings), and input-output tables for individual regions. Moreover, consistency among the sources must be ensured. This is a challenging and time-consuming task. Therefore, many CGE models have used existing databases such as the Global Trade, Assistance, and Production (GTAP) data package. Although convenient, the GTAP database has some major disadvantages: the latest update of the database at the time of model building only goes as far as 1997[7]; furthermore, the database does not provide Canadian provincial data. For this reason the decision was made to develop a new database, collecting data from a variety of national and international sources.

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[7] A new database based on 2001 will be available in the summer of 2004

The Canadian inter-provincial and international trade flows data were obtained from the National Accounts Division of Statistics Canada and the World Trade Organizer Database. The United States' trade flows with the rest of the world (ROW) were retrieved from the World Trade Analyzer database.

The six Canadian economic regions were assumed to share the same production technology as Canada as a whole, therefore the Canadian input-output table was used to derive the production technology coefficients; i.e., the share of intermediate inputs, labour and capital in final production. Due to confidentiality issues, provincial input-output tables have many cells with non-available data ("suppressed") that renders their use not always convenient. The Canadian input tables were retrieved from CANSIM II database (tables 381009 and 3810010) for 1999. The US Bureau of Economic Analysis provided the United States' input tables.

Information on tariffs originated from GTAP[8] version 5, which provides weighted average tariffs for trade flows with the USA and the rest-of the world (and tariff equivalents of some non-tariff barriers) for the year 1997.

As data were collected from various sources, it was a challenge to ensure consistency of the dataset and to balance the social accounting matrix for every region—that is to say to ensure that a) supply equals demand for all goods and services; b) budget constraints for firms and consumers are satisfied; c) domestic external trade balances equal to zero; and d) firms in all sectors make no excess profits.

Once consistency of the data set was established, the model was calibrated; this involved determination of the share parameters in the supply side ($\alpha_{L_{is}} \cdot \alpha_{K_{is}} \cdot \alpha_{tis}$) and demand side parameters of the model ($\rho_{si}, \delta_{jsi}, \beta_{jtis}$), such that the various supply and demand equations given the benchmark year dataset were satisfied. This approach is quite standard (see for instance, Srinivasan and Whalley, 1986).

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[8] GTAP (2001), Global Trade, Assistance, and Production: The GTAP 5 Data Package, Centre for Global Trade Analysis, Purdue University

Concluding notes

The ITCan CGE model described above can be readily used to shed light on the impact of a hypothetical customs union between Canada and the USA, involving harmonization of external tariffs, reduction in remaining bilateral trade protection, and elimination of internal rules of origin. In combination with econometric results, this model can be used to evaluate "unobserved" trade costs between Canada and the USA,[9] and subsequently assess the impact of reduction of these costs following changes in trade policies, such as a common market with the US, or a hypothetical policy leading to harmonization of standards and regulations between the two countries. Furthermore, the model can be extended or adapted to address a number of other policy and trade issues in particular, such as foreign direct investment, environmental issues or issues related to intellectual property. By extending the database to other countries, the impact of hypothetical bilateral and multilateral trade agreements involving Canada could be evaluated.

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[9] See above at p.9.

Appendix

Table 1: Sectoral Mapping and Commodities Classification

Sectors of the model	Commodities Classification Trade Flow level S, Statistics Canada
Agriculture	Grains; Other Agricultural Products; Forestry; Crude Fish and Seafood; Trapping
Food, Beverages and Tobacco	Meat, Processed Fish and Dairy products; Frozen Food and Vegetables; Other Food products; Feeds; Soft Drinks and Alcoholic Beverages; Tobacco and Tobacco products.
Textiles	Textiles products
Clothing	Hosiery, clothing and accessories
Wood products	Lumber and wood products
Furniture and Fixtures	Furniture and Fixtures
Paper Products	Wood pulp, paper and paper products
Printing and Publishing	Printing and Publishing
Chemicals, Fertilizers and Pharmaceuticals	Chemicals, Pharmaceuticals & chemical products
Petroleum and mineral fuels	Mineral fuels; Petroleum and coal products
Leather, Rubber and Plastic products	Leather, Rubber and Plastic products
Non-metal Mineral products	Non-metallic mineral products
Metal Products	Primary metal & Other metal products
Non-electrical machinery	Machinery and equipment
Electrical Machinery	Electrical, electronic and comm. products
Transport Equipment	Motor veh., other transport equip. and parts.
Misc. Manufactured	Other manufactured goods
Mining and Quarrying other that Petroleum.	Metal ores & concentrates; Non-metallic minerals; Services incidental to mining
Communication Services and Other Utilities	Communication Services; Other Utilities.
Construction	Residential construction; Non-residential construction; Repair construction
Wholesale trade	Wholesaling marging; Retailing marging
Transportation and Storage	Transportation and Storage
Financial Services	Other Finance, insurance, and real estate services
Other Services	Business and computer; Private education; health and social; Accommodation and meals; Other; Transportation Margin; Operating Office, cafeteria and lab. Supplies; Travel & entertainment.

Source: Statistics Canada, National Accounts Division, Table 386-0001 Interprovincial and International Trade Flow by Producer Cost (mil. C$ 1999).

Table 2: Elasticities of Substitution between imported and domestic goods and services	Canadian Regions	USA	Rest of World
Agriculture and Forestry	*5.3*	*5.3*	*3.5*
Food, Beverages and Tobacco	*5.4*	*5.4*	*3.6*
Textiles	6.2	6.2	*3.3*
Clothing	4.5	4.5	3.0
Wood products	6.4	6.4	*4.2*
Furniture and Fixtures	6.8	6.8	4.5
Paper Products	*4.1*	*4.1*	*2.7*
Printing and Publishing	5.6	5.6	*2.7*
Chemicals, Fertilizers and pharmaceuticals	4.8	4.8	*3.3*
Petroleum products and mineral fuels	*4.4*	*4.4*	*2.9*
Leather, rubber and plastic products	*5.0*	*5.0*	*3.3*
Non-metal mineral products	8.3	8.3	*4.2*
Metal Products	5.1	5.1	*4.2*
Non-electrical machinery	8.6	8.6	*4.2*
Electrical Machinery	*6.3*	*6.3*	*4.2*
Transport equipment	7.5	7.5	5.0
Miscellaneous manufacturers	*6.3*	*6.3*	*4.2*
Mining and Quarrying other than Petroleum	*6.3*	*6.3*	*4.2*
Communication Services and Other Utilities	*5.3*	*5.3*	*3.6*
Construction	*4.3*	*4.3*	*2.9*
Wholesale trade	*4.3*	*4.3*	*2.9*
Transportation and storage	*4.3*	*4.3*	*2.9*
Financial services	*4.3*	*4.3*	*2.9*
Personal, Business and Other Services	*4.3*	*4.3*	*2.9*

1) Sectors in italics: elasticities of substitution for the Rest of World from the GTAP 5 Database: we calculated the average between the elasticity of substitution between the domestic and composite imported good, and the elasticity of substitution between the different sources of imports, as provided by GTAP 5 (variables SIGMAD and SIGMAM respectively). As per convention we multiplied the ROW estimates by 1.5 to derive the Canadian and US elasticities

2) Sectors in regular font: elasticities of substitution for Canada are where available from Erkel-Rousse H. and Daniel Mirza, (2002) "Import Prices Elasticities: Reconsidering the Evidence", *Canadian Journal of Economics*, Vol. 35, No.2, May 2002; Table A1 (Generalized Method of Moments estimates), p. 30. We assumed the same elasticities for the US. Rest of World estimates were derived by GTAP 5 when available, or otherwise were obtained by dividing the Canadian estimate by 1.5.

U.S.-Canadian Trade and U.S. State-Level Production and Employment

Joseph F. Francois and Laura M. Baughman*

Introduction

Like a friendship of long duration, the U.S.-Canada economic relationship is essentially comfortable and periodically stormy. With time, some sectors of the two economies have become so intertwined as to be virtually borderless. Others have become increasingly sensitive to cross-border competition. This increased sensitivity has led to heightened trade tensions.

It is during such periods of conflict, in economic relationships as well as relationships between old friends, that is useful to step back and remember why we are friends in the first place. Geography of course has a lot to do with it. It is convenient to be good friends with your next-door neighbour. Also important have been trade agreements that have broken down barriers between the two economies. Rules governing fair play help to resolve many arguments before they get started. The United States has the same geographic and trade agreement relationships with Mexico but that relationship is not as deep as its relationship with Canada. So similar levels of development and a much longer history of cooperation are also important contributors to the close relationship between the two economies.

The result has been growing trade and investment flows and deepening integration of many sectors of the two economies. But increased trade and outward investment can be an easy target for criticism in election years. In the case of the United States, the prevailing view is that exports are "good," and imports are "bad." Even imports from friends and neighbours are "bad" in the basic mercantilist calculus. Consequently, the United States and Canada have recently found themselves embroiled in trade disputes over lumber, beef, wheat, and steel, to name just a few, stemming from complaints from U.S. sectors that imports from Canada have been causing economic hardship, including job losses, in the United States.

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* Joseph Francois is professor of economics and chair of political economy and international economic development with the Erasmus University Rotterdam (since 1996), a fellow of the Tinbergen Institute and the Centre for Economic Policy Research, director of the European Trade Study Group, and a board member of the Global Trade Analysis Project. Laura Baughman is President, Trade Partnership Worldwide, LLC. The views presented in this Chapter are those of the authors and not to be attributed to the Department of International Trade or to the Government of Canada.

The actual relationship between trade and employment is of course much more complex. It involves interactions across a broad range of sectors and regions, and it involves both imports and exports, as well as linkages at intermediate stages (like U.S. auto plants using Canadian-made parts, and vice-versa).

This chapter examines the impact of U.S.-Canada trade on the economies of U.S. states. Since jobs are frequently offered as a barometer of the "damage" caused by trade, we explore the question of how many U.S. jobs are linked to trade with Canada. We focus not just on jobs related to exporting, but also jobs related to importing and to the servicing of both exports and imports. In other words, how many workers manufacture goods and services that are exported to Canada, transport them there, finance their sale, wholesale and warehouse them – and, how many U.S. jobs process imports from Canada, wholesale and warehouse them, advertise them, finance them, and retail them. Moreover, since politics is ultimately local, we also examine how these jobs break down by state. In addition, we explore the related linkage between trade and state level economic activity, as measured by gross state product (GSP).

The U.S.-Canada Relationship: What Everyone Already Knows

It is worth reviewing briefly the obvious importance to the United States of the U.S.-Canada economic relationship. Canada is far and away the largest single country destination for U.S. goods exports and source of U.S. goods imports. In 2003, U.S. exports to Canada of $169.8 billion outpaced even total exports to Western Europe ($164.9 billion) (Table 1). U.S. imports from Canada in 2003, totalling $224.2 billion, exceeded imports from China ($152.4 billion) and Japan ($118.0 billion).

Table 1: U.S. Goods Trade with the World, 2003, US$ billions

	Exports	Imports
Total	713.8	1,263.2
Canada	169.8	224.2
Mexico	97.5	138.1
Western Europe	164.9	266.2
Eastern Europe/Former Soviet Union	7.1	18.3
China	28.4	152.4
Japan	52.1	118.0
Other Pacific Rim	108.2	148.3
South/Central America	52.0	78.9
OPEC	17.3	68.4

Source: U.S. Department of Commerce, Bureau of Economic Analysis

U.S. goods trade with Canada has been growing over the years. On average over the last 10 years, U.S. goods exports to Canada have increased at an average annual rate of 4.6 percent, despite some decreases during the period. Canada accounts for an increasing share of total U.S. goods exports, and that share reached almost 24 percent in 2003 (Table 2). Over the last 10 years, goods import growth has averaged 5.7 percent a year. However, Canada's share of total U.S. goods imports has fallen over the last 10 years to less than 18 percent by 2003.

The aggregate data show why U.S. trade with Canada is sometimes controversial. The U.S. goods trade deficit with Canada widened substantially over the years, particularly in 2000-2003. However, Canada's share of the total U.S. goods trade deficit has actually declined since 2000.

Trends in U.S. services trade with Canada are broadly similar to those in goods trade, with both exports and imports having increased. However, the scale of the flows is much smaller and the United States maintains a surplus with Canada.

Table 2: U.S. Trade in Goods and Services with Canada, 1994-2003

	Trade in Goods			Trade in Services		
	Exports	Imports	Balance	Exports	Imports	Balance
			Billions of US Dollars			
1994	114.7	131.1	-16.5	17.0	9.7	7.3
1995	127.4	146.9	-19.5	17.7	10.8	6.9
1996	134.3	158.5	-24.3	19.3	12.2	7.1
1997	151.9	170.1	-18.2	20.3	13.7	6.6
1998	156.7	175.8	-19.1	19.3	15.1	4.2
1999	166.7	201.3	-34.6	22.5	16.1	6.4
2000	178.9	233.7	-54.8	24.4	17.6	6.8
2001	163.3	218.7	-55.5	24.5	17.6	6.9
2002	160.9	211.8	-50.9	24.3	18.4	5.9
2003	169.8	224.2	-54.4			
			Percent			
1994	22.8	19.6	10.0	9.1	8.2	10.7
1995	22.1	19.6	11.1	8.7	8.5	9.1
1996	21.9	19.7	12.7	8.7	8.9	8.4
1997	22.4	19.4	9.2	8.5	9.1	7.6
1998	23.4	19.2	7.7	7.9	9.2	5.2
1999	24.4	19.5	10.0	8.5	8.9	7.5
2000	23.2	19.1	12.1	8.6	8.6	8.7
2001	22.7	19.1	13.0	8.9	8.7	9.4
2002	23.6	18.2	10.5	8.7	9.0	7.9
2003	23.8	17.8	9.9			

Source: U.S. Department of Commerce, Bureau of Economic Analysis

It is at the sectoral level in goods trade that the plot thickens and most of the controversy arises.

U.S. exports to and imports from Canada actually exhibit a good degree of commonality, in the sense that many of the same categories of products figure prominently in both flows. This suggests a good deal of co-production, such as that which takes place in the motor vehicle sector; the two countries' auto sectors have been deeply integrated for many years (Table 3).

Co-production, however, is not the case in every sector. Controversy has arisen in the United States over lumber imported from Canada. Canada's steel exports were included in a U.S. steel safeguard action in 2001. Controversy also has arisen over imports of products from Canada that do not register among the top ten largest imports from Canada. These include pharmaceutical products, imports of which reached just $1.8 billion in 2003 (but as such represented a considerable increase over the $423.3 million imported in 1996); meat ($1.7 billion in imports in 2003); and cereal and flour preparations ($1.3 billion in 2003, up from $490.8 million in 1996).

Table 3: Leading Sectors in U.S. Goods Trade with Canada, 2000-2003

	2000	2001	2002	2003
	Exports (billions of US dollars)			
Vehicles (HS 87)	32.8	29.3	33.3	35.0
Non-electrical machinery (HS 84)	30.6	27.4	25.9	26.0
Electrical machinery (HS 85)	18.0	14.3	12.3	11.9
Plastics (HS 39)	6.9	6.6	6.9	7.5
Iron and steel (HS 72 & 73)	5.8	5.3	5.3	5.6
Precision instruments (HS 90)	5.8	5.3	4.7	4.8
Mineral fuels (HS 27)	2.6	3.6	2.6	4.0
Paper, paperboard, paper pulp (HS 48)	3.7	3.7	3.6	3.8
Rubber and products (HS 40)	2.8	2.6	2.6	2.6
Pharmaceuticals (HS 30)	2.0	1.9	2.1	2.4
	Imports (billions of US dollars)			
Vehicles (HS 87)	56.7	50.7	52.4	52.8
Mineral fuels (HS 27)	31.4	34.2	29.6	41.3
Non-electrical machinery (HS 84)	18.8	17.2	16.2	16.0
Wood and wood products (HS 44)	10.8	10.1	9.9	10.4
Paper, paperboard, paper pulp (HS 48)	10.1	10.1	9.3	9.0
Electrical machinery (HS 85)	16.9	11.1	9.0	8.4
Plastics and products (HS 39)	6.7	6.8	7.0	7.8
Aircraft (HS 88)	4.7	6.1	5.3	6.3
Iron and steel (HS 72 & 73)	5.7	5.0	5.6	5.5
Furniture (HS 94)	5.3	4.9	4.9	5.1

Source: Bureau of the Census

Estimating Direct and Indirect Effects

What grabs headlines in the United States and attention in political circles is the impact of imports on U.S. producers of import-competing products. U.S. producers of softwood lumber, steel, cattle and wheat have been at the front of the line clamouring for U.S. policy makers to restrict access for these Canadian products to the U.S. market. A frequent lament is the negative impact of imports on U.S. jobs.

The linkages between exports and/or imports to labour demand and total output across sectors can be mapped using input-output tables. Such an approach presents several problems, however. The first is that the shares in the base data basically fix the structure of production and demand. In addition, there might be double counting, as the net effect of exports and imports is not the simple sum of export effects and import effects. Such an approach might also overestimate the effects of trade with one particular trading partner if substitution toward trade with the rest of the world is not also taken into account.

In this study, we address these issues by applying a multi-sector CGE model of the U.S. economy that: (i) covers all world trade and production; and (ii) includes intermediate linkages between sectors. CGE models feature input-output structures (based on regional and national input-output and employment tables) that explicitly link industries in a value-added chain from primary goods, through intermediate processing, to the final assembling of goods and services for consumption. Inter-sectoral linkages can be direct, like the input of steel in the production of transport equipment, or indirect, via intermediate use in other sectors. CGE models capture these linkages by modelling firms' use of factors and intermediate inputs.

Data on production and trade are based on national social accounting data linked through trade flows (see Reinert and Roland-Holst, 1997). These social accounting data are drawn directly from the most recent version of the *Global Trade Analysis Project* (GTAP) dataset, version 6.0 (Dimaranan and McDougall, 2002). The GTAP 6.0 dataset is benchmarked to 2001, and includes detailed national input-output, trade, and final demand structures. The basic social accounting and trade data are supplemented with U.S. Department of Labor data on state-level employment and U.S. Bureau of Economic Analysis data on state-level output. These data allow us to map nation-wide effects to state-level changes in employment and output. Data on tariffs are taken from the WTO's integrated database; supplemental information (including on non-tariff barriers) is drawn from the World Bank's recent assessment of detailed pre- and post-Uruguay Round tariff schedules and from the UNCTAD/World Bank *World Integrated Trade Solution* (WITS) dataset. The tariff information was mapped to GTAP model sectors within the version 6 database (Table 4). The GTAP regions are aggregated into the U.S., Canada, and rest-of-world.

Aggregate demand in each region is modelled through a composite regional household, with expenditures allocated over government, personal consumption, and savings. The composite household receives income from selling its endowments of factors of production to firms, as well as from domestic taxes, tariff revenues, and rents accruing from import/export quota licenses (when applicable). Part of the income is distributed as subsidy payments to some sectors, primarily in agriculture.

On the production side, in all sectors, firms employ domestic production factors (capital, labour and land) and intermediate inputs from domestic and foreign sources to produce outputs in the most cost-efficient way that technology allows. Capital stocks are fixed at the national level. Firms are competitive, and employ capital and labour to produce goods and services subject to constant returns to scale.[1] Products from different regions are assumed to be imperfect substitutes in accordance with the so-called "Armington" assumption. The trade elasticities used to model Armington demand for imports are the standard GTAP elasticities (Table 5). The sensitivity of the results to changes in these elasticities are discussed in the results section.

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[1] Compared to dynamic CGE models and models with alternative market structures, the present assumption of constant returns to scale with a fixed capital stock is closest in approach to older studies based on pure input-output modelling of trade and employment linkages. In the present context, it can be viewed as generating a lower-bound estimate of effects relative to alternative CGE modelling structures.

Table 4: Model Sectors and Mapping to GTAP Sectors

Model Sectors		Corresponding GTAP sectors
Primary		
1	Agriculture, forestry & fisheries	1 to 14
2	Mining	15, 16, 17, 18
Construction		
3	Construction	46
Manufacturing		
	Durable goods	
4	Lumber & wood	30
5	Stone, clay, glass	34
6	Primary metals	35,36
7	Fabricated metals	37
8	Industrial machinery	41
9	Electronic equipment	40
10	Motor vehicles	38
11	Other transportation equipment	39
12	Other manufacturing	42
	Non-durable goods	
13	Food, beverages, and tobacco	19-26
14	Textiles	27
15	Apparel	28
16	Paper products, publishing	31
17	Chemicals, rubber, plastics	33
18	Petroleum products	32
19	Leather products	29
Services		
	Transportation & utilities	
20	Transportation	48, 49, 50
21	Communications	51
22	Electric, gas, & sanitary	43, 44, 45
23	Trade	47
	Finance and Insurance	
24	Finance	52
25	Insurance	53
26	Other Private Services	54, 55, 57
27	Public Services	56

Source: Authors' aggregation from GTAP database.

Table 5: Trade Substitution Elasticities

		Trade substitution elasticity	
		upper	lower
Primary			
1	Agriculture, forestry & fisheries	2.4	4.6
2	Mining	2.8	5.6
Construction			
3	Construction	1.9	3.8
Manufacturing			
	Durable goods		
4	Lumber & wood	2.8	5.6
5	Stone, clay, glass	2.8	5.6
6	Primary metals	2.8	5.6
7	Fabricated metals	2.8	5.6
8	Industrial machinery	2.8	5.6
9	Electronic equipment	2.8	5.6
10	Motor vehicles	5.2	10.4
11	Other transportation equipment	5.2	10.4
12	Other manufacturing	2.8	5.6
	Non-durable goods		
13	Food, beverages, and tobacco	2.4	4.7
14	Textiles	2.2	4.4
15	Apparel	4.4	8.8
16	Paper products, publishing	1.8	3.6
17	Chemicals, rubber, plastics	1.9	3.8
18	Petroleum products	1.9	3.8
19	Leather products	4.4	8.8
Services			
	Transportation & utilities		
20	Transportation	1.9	3.8
21	Communications	1.9	3.8
22	Electric, gas, & sanitary	2.8	5.6
23	Trade	1.9	3.8
	Finance and Insurance		
24	Finance	1.9	3.8
25	Insurance	1.9	3.8
26	Other Private Services	1.9	3.8
27	Public Services	1.9	3.8

Source: GTAP database.

We wish to address the following question: given the current wage structure of the labour force, how many jobs in the U.S. economy are linked either directly or indirectly to trade? While our model, at the macro level, follows the basic GTAP structure (Hertel et al 1997, Hertel and Itakura 2000), we employ labour market closure (equilibrium conditions): that is, we fix wages at current levels, and force employment levels to adjust. This provides a direct estimate of the jobs supported, at current wage levels, by the current level of trade. In addition, employment and output are mapped by a set of side equations (equations added to the core model) to capture state-level effects.

Elasticities are calculated directly from our experiment results. They provide a measure of the marginal impact of U.S.-Canada trade on employment and output, mapping the impact of this relationship across states and sectors and highlighting the importance of the structure of output and employment at the state level. The formal derivation of the elasticities is given in Appendix 1.

The experiments conducted with the model involve imposing changes in U.S.-Canada trade. This allows us to deconstruct the trade relationship, tracing changes at the border as they work through the U.S. economy. We conduct three sets of experiments. The first is a reduction of U.S. exports to Canada.[2] This involves both a 1% reduction (so that we can estimate a set of employment and output elasticities) and also full elimination of trade (so that we can estimate full effects). The second is a reduction of U.S. imports from Canada.[3] This again involves both a 1% reduction (so that we can estimate a set of employment and output elasticities) and also full elimination of trade

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[2] This is accomplished by making the set of bilateral tariffs with the U.S. endogenous, while making trade quantities exogenous and then reducing them by target amounts.

[3] This is accomplished by making a set of bilateral export taxes with the U.S. endogenous, while making trade quantities exogenous and then reducing them by target amounts, which is appropriate since the relevant question is the benefit of current conditions of trade.

(so that we can estimate full effects). The final experiment is a reduction of U.S. exports to Canada and imports from Canada.[4] This again involves both a 1% reduction and also full elimination of trade.

Results

The results of our experiments are reported in Tables 6 through 9. Our analysis demonstrates that trade with Canada (exports plus imports) in 2001 supported approximately $162 billion in U.S. economic activity (Table 6). Not surprisingly, from the perspective of total state output supported by trade with Canada, the largest states benefited the most. Across states, the greatest absolute output benefits from trade with Canada were enjoyed by California ($22 billion), New York ($14 billion), Texas ($10 billion) and Illinois and Florida (roughly $8 billion each). But more interestingly, on a share basis, output effects range from a low of between 0.1 and 0.6 percent of total 2001 gross state output (New Mexico and Arizona) to a high of 2.1 percent (Delaware, Michigan, Wyoming).

All of this output related to trade with Canada supports jobs, both directly (in the manufacture of goods for export, for example) and indirectly (in sectors that get the goods out the manufacturing door and across the border to Canada. Jobs related to importing also span the sectors, and include jobs related to transporting, wholesaling and warehousing, advertising, financing and retailing products imported from Canada, for example. Our analysis indicates that trade with Canada in 2001 supported 5.2 million direct and indirect American jobs (Table 7). At the state level, the largest absolute numbers of jobs supported by trade with Canada were in California (626 thousand), Texas (368 thousand), New York (348 thousand), Illinois (288 thousand) and Florida (237 thousand). On a share basis, job effects range from 2.9 percent (Wyoming) to 3.4 percent (New York, Rhode Island, Nevada).

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[4] This is accomplished by making the sets of bilateral instruments endogenous as discussed in notes 3 and 4, while making trade quantities exogenous and then reducing them by target amounts. The implied trading costs amount to 75% of consumer prices for imports from Canada, and 70% of consumer prices for exports to Canada.

Table 6: Impact of Trade on Gross State Product, 2001
US$ millions

	Total	Exports	Imports		Total	Exports	Imports
Alabama	1,894	1,051	1,345	Montana	346	184	251
Alaska	350	215	249	Nebraska	971	479	722
Arizona	2,445	949	1,986	Nevada	1,262	647	928
Arkansas	1,019	557	727	New Hampshire	733	350	553
California	21,836	10,378	16,440	New Jersey	6,012	3,165	4,307
Colorado	2,604	1,294	1,938	New Mexico	666	287	527
Connecticut	2,790	1,242	2,160	New York	14,151	7,247	10,336
Delaware	754	411	533	North Carolina	4,525	2,382	3,242
DC	1,369	693	1,006	North Dakota	283	151	205
Florida	7,829	3,861	5,820	Ohio	6,233	3,459	4,419
Georgia	4,624	2,388	3,374	Oklahoma	1,354	722	985
Hawaii	796	398	589	Oregon	1,699	588	1,398
Idaho	551	271	403	Pennsylvania	6,577	3,472	4,741
Illinois	7,913	4,158	5,696	Rhode Island	625	293	474
Indiana	3,267	1,839	2,316	South Carolina	1,899	1,058	1,325
Iowa	1,476	809	1,040	South Dakota	385	198	280
Kansas	1,270	587	980	Tennessee	3,126	1,683	2,242
Kentucky	2,038	1,225	1,409	Texas	10,165	5,275	7,487
Louisiana	1,408	985	928	Utah	1,149	580	853
Maine	584	286	438	Vermont	300	139	228
Maryland	3,351	1,689	2,464	Virginia	4,648	2,411	3,380
Massachusetts	4,798	2,316	3,586	Washington	3,532	1,508	2,797
Michigan	5,590	3,197	3,937	West Virginia	581	347	401
Minnesota	3,042	1,604	2,198	Wisconsin	2,865	1,583	2,020
Mississippi	1,059	532	783	Wyoming	166	132	102
Missouri	2,980	1,560	2,171	**United States**	161,893	82,834	118,719

Source: Authors' estimates.

Table 7: Impact of Trade on State Employment (Number of jobs)

	Total	Exports	Imports		Total	Exports	Imports
Alabama	71,523	37,568	51,983	Montana	16,375	8,796	11,765
Alaska	13,104	6,946	9,494	Nebraska	35,507	18,633	25,725
Arizona	88,894	44,965	65,535	Nevada	43,179	22,622	31,352
Arkansas	44,750	23,793	32,328	New Hamp.	23,743	12,034	17,444
California	626,044	319,005	459,619	New Jersey	153,333	80,025	111,260
Colorado	92,585	47,850	67,574	New Mexico	29,603	15,558	21,482
Connecticut	66,844	33,474	49,498	New York	347,817	180,236	253,522
Delaware	16,368	8,434	11,955	North Carolina	150,635	77,374	110,138
DC	28,987	15,148	21,034	North Dakota	12,550	6,733	9,000
Florida	288,804	149,617	210,561	Ohio	212,049	114,733	151,918
Georgia	152,330	80,034	110,352	Oklahoma	58,386	31,858	41,704
Hawaii	25,564	13,292	18,613	Oregon	63,245	33,131	45,896
Idaho	22,861	11,975	16,559	Pennsylvania	219,130	114,571	159,252
Illinois	236,625	125,426	170,660	Rhode Island	18,850	9,619	13,827
Indiana	111,693	60,556	80,153	South Carolina	69,114	35,709	50,363
Iowa	55,453	29,081	40,190	South Dakota	14,796	7,789	10,698
Kansas	50,958	25,459	37,873	Tennessee	107,857	57,183	77,968
Kentucky	68,634	37,375	49,126	Texas	368,765	194,312	267,314
Louisiana	73,441	39,016	53,104	Utah	43,611	22,232	32,072
Maine	23,923	12,362	17,495	Vermont	12,308	6,290	9,019
Maryland	100,935	52,513	73,387	Virginia	141,273	72,899	103,203
Mass.	134,197	68,385	98,371	Washington	107,555	53,375	80,096
Michigan	174,360	95,182	124,766	West Virginia	25,495	14,073	18,152
Minnesota	102,710	53,995	74,313	Wisconsin	103,171	55,975	73,638
Mississippi	43,328	22,337	31,755	Wyoming	9,227	5,132	6,564
Missouri	107,569	56,867	77,820	**United States**	5,210,057	2,727,265	3,782,634

Source: Authors' estimates.

Note that the elasticities in Tables 8 and 9 are as defined by equations (5), (6), (13), (14), (17), and (18). They provide a rough sense of the percent of GSP and the labour force at the national, state, and sector level supported by the entire trade relationship. Hence extrapolation from the value for employment for the U.S. as a whole in Table 9 implies that the full trade relationship supports 3.27 percent of total employment.[5] This is less than the sum suggested by the import and export elasticities (0.0219 and 0.0229), highlighting the importance of examining the trade effects jointly, rather than relying on export and import effects separately to estimate the total effect. As such, this also highlights the advantage of using a CGE model over simple input-output matrix calculations to estimate joint effects for all bilateral trade. At the state level, the employment elasticity tables again show total effects from both imports and exports. These import and export elasticities are relatively similar at the aggregate level. The overall similarity is a consequence of the similar relative values of U.S.-Canada trade on the import and export side. Since the estimated gains from trade on both the import and export side are based on comparable trade flows, the aggregate effects of each are similar. This similarity gives way to differences as we move to the state level.

State results vary due to differences in the sector composition of the local economies, in terms of both employment and production. Making calculations from the elasticities in Table 9, on a share basis, total job effects range from around 2.9 percent (Wyoming) to 3.4 percent (New York, Rhode Island, Nevada). From the elasticities in Table 8, on a share basis, output effects range from a low of between 0.1 and 0.6 percent (New Mexico and Arizona) to a high of 2.1 percent (Delaware, Michigan, Wyoming).

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[5] It is important to recall the working definition of jobs at current wage levels. When all trade is eliminated, the exact estimate of employment is actually 3.1 percent, close to the value suggested by the employment elasticity.

Table 8: Percent Impact of Trade on Gross State Product (elasticities)

	All Trade	Exports	Imports		All Trade	Exports	Imports
Alabama	0.0183	0.0127	0.0126	Montana	0.0176	0.0121	0.0124
Alaska	0.0118	0.0096	0.0084	Nebraska	0.0182	0.0119	0.013
Arizona	0.0173	0.0101	0.0131	Nevada	0.0179	0.012	0.0127
Arkansas	0.0178	0.0123	0.0123	New Hampshire	0.0182	0.0116	0.0131
California	0.0182	0.0116	0.0131	New Jersey	0.0191	0.0129	0.0133
Colorado	0.0178	0.0117	0.0128	New Mexico	0.0141	0.0091	0.0104
Connecticut	0.0183	0.0113	0.0134	New York	0.0187	0.0124	0.0132
Delaware	0.0196	0.0133	0.0135	North Carolina	0.0185	0.0124	0.0128
DC	0.0206	0.0135	0.0147	North Dakota	0.0175	0.012	0.0122
Florida	0.0187	0.0122	0.0134	Ohio	0.019	0.0129	0.0131
Georgia	0.0184	0.0122	0.013	Oklahoma	0.017	0.0117	0.012
Hawaii	0.0195	0.0128	0.014	Oregon	0.0161	0.0089	0.0121
Idaho	0.0175	0.0114	0.0122	Pennsylvania	0.0183	0.0124	0.0127
Illinois	0.0187	0.0126	0.013	Rhode Island	0.0187	0.0119	0.0135
Indiana	0.0189	0.0129	0.0131	South Carolina	0.0193	0.0133	0.0131
Iowa	0.0184	0.0126	0.0126	South Dakota	0.0182	0.0122	0.0128
Kansas	0.0174	0.0111	0.0127	Tennessee	0.019	0.0127	0.0132
Kentucky	0.0187	0.0131	0.0127	Texas	0.0162	0.0112	0.0116
Louisiana	0.012	0.0101	0.0081	Utah	0.0182	0.0121	0.013
Maine	0.0181	0.0119	0.013	Vermont	0.0179	0.0114	0.0129
Maryland	0.0192	0.0126	0.0136	Virginia	0.0189	0.0126	0.0133
Massachusetts	0.0184	0.0119	0.0132	Washington	0.0178	0.0109	0.0134
Michigan	0.0197	0.0133	0.0136	West Virginia	0.0167	0.0124	0.0114
Minnesota	0.0185	0.0124	0.0129	Wisconsin	0.0182	0.0126	0.0124
Mississippi	0.0183	0.0121	0.013	Wyoming	0.0102	0.0097	0.0066
Missouri	0.0187	0.0124	0.0132	**United States**	0.0182	0.0121	0.0128

Source: Authors' estimates.

Table 9: Percent Impact of Trade on State Employment (elasticities)

	All Trade	Exports	Imports		All Trade	Exports	Imports
Alabama	0.0318	0.0214	0.0224	Montana	0.0312	0.0213	0.0217
Alaska	0.0323	0.0219	0.0227	Nebraska	0.0313	0.0210	0.0219
Arizona	0.0328	0.0216	0.0233	Nevada	0.0340	0.0228	0.0239
Arkansas	0.0309	0.0209	0.0216	New Hamp.	0.0329	0.0217	0.0232
California	0.0329	0.0217	0.0232	New Jersey	0.0340	0.0227	0.0238
Colorado	0.0328	0.0219	0.0231	New Mexico	0.0318	0.0215	0.0223
Connecticut	0.0332	0.0217	0.0236	New York	0.0340	0.0226	0.0239
Delaware	0.0336	0.0223	0.0236	North Carolina	0.0323	0.0214	0.0227
Dist. of Columbia	0.0358	0.0239	0.0251	North Dakota	0.0303	0.0207	0.0211
Florida	0.0337	0.0225	0.0237	Ohio	0.0331	0.0225	0.0230
Georgia	0.0329	0.0221	0.0230	Oklahoma	0.0306	0.0211	0.0212
Hawaii	0.0337	0.0225	0.0237	Oregon	0.0319	0.0214	0.0223
Idaho	0.0308	0.0207	0.0215	Pennsylvania	0.0330	0.0221	0.0231
Illinois	0.0333	0.0224	0.0232	Rhode Island	0.0340	0.0225	0.0240
Indiana	0.0324	0.0220	0.0226	South Carolina	0.0324	0.0216	0.0227
Iowa	0.0310	0.0209	0.0217	South Dakota	0.0307	0.0207	0.0214
Kansas	0.0306	0.0202	0.0219	Tennessee	0.0322	0.0217	0.0225
Kentucky	0.0310	0.0212	0.0215	Texas	0.0317	0.0214	0.0222
Louisiana	0.0316	0.0215	0.0222	Utah	0.0325	0.0215	0.0230
Maine	0.0322	0.0215	0.0227	Vermont	0.0322	0.0213	0.0226
Maryland	0.0337	0.0225	0.0237	Virginia	0.0330	0.0219	0.0232
Massachusetts	0.0338	0.0223	0.0239	Washington	0.0318	0.0208	0.0228
Michigan	0.0334	0.0226	0.0232	West Virginia	0.0312	0.0217	0.0216
Minnesota	0.0324	0.0218	0.0226	Wisconsin	0.0320	0.0219	0.0221
Mississippi	0.0309	0.0206	0.0218	Wyoming	0.0291	0.0205	0.0202
Missouri	0.0324	0.0218	0.0227	**United States**	0.0327	0.0219	0.0229

The estimates reported here are, of course, sensitive to the parameters used in the model. The most important of these are the trade substitution elasticities in Table 5. To explore this issue, Table 10 reports a range of estimates for macroeconomic effects, under alternative sets of higher and lower trade elasticities. The exact magnitude of effects depends on these values, while the basic pattern of results remains the same. The results in Tables 6 through 9 correspond to the mid-point estimates.

Table 10: Sensitivity Analysis with Respect to Trade Elasticities, "All Trade" Results

	A = (1-.25)*B	B	C = (1+.25)*B
	Low elasticities	GTAP elasticities	High elasticities
GDP, %	3.0	2.1	1.6
Total Employment, %	4.4	3.1	2.4
Total State Employment, jobs	7,422,762	5,210,057	4,033,086
Real household income, %	3.93	2.74	2.11
Investment, %	4.07	2.84	2.18
Trading cost share of consumer			
• price for imports from Canada	83.9	74.6	66.6
• price for exports to Canada	79.5	69.6	61.5

Note: Trading costs are the value generated endogenously in the experiment that closes down essentially all trade (as defined in the text). Other values then represent the estimated effects of current trade levels.
Source: Authors' estimates.

Summary and Conclusion

We have examined the impact of the U.S.-Canadian trade relationship on the economies of U.S. states. To do this, we have employed a computable general equilibrium (CGE) model of the U.S. and Canadian economies. This allows us to focus on jobs related to the complex interaction between exporting, importing, and the servicing of trade. In addition, we have examined the related linkage between trade and state level economic activity, as measured by gross state product (GSP). Our results are summarized in a set of state-level employment and output elasticities linking trade volumes to economic activity at the state level. These point to a significant contribution by trade to employment in the United States. The results also demonstrate the benefits of general equilibrium analysis over simple input-output or multiplier analysis. The latter approaches can overstate the actual labour market impact, as there is scope for double counting of export and import effects (since they actually interact), and also because one misses adjustment to trade patterns with the rest of the world.

Our analysis demonstrates that the trade relationship between the United States and Canada is a definite "plus" for the

United States.[6] The fuller picture must of course be weighed by policy makers in evaluating pleas for protection from competition from Canadian exporters.

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[6] We speculate that a similar analysis for Canada would demonstrate parallel benefits to Canadian output and employment.

Appendix 1: Derivation of elasticities

Formally, export elasticities are defined as follows. For employment E and Gross State Product (GSP) G in state j in sector i, the impact of a percent change in exports X to Canada $\%\Delta E$ involves the sector export elasticity $\varepsilon_{i,j}$:

$$\varepsilon_{i,j}^{emp} = \frac{\%\Delta E_{i,j}}{\%\Delta X} \qquad (1)$$

$$\varepsilon_{i,j}^{GSP} = \frac{\%\Delta G_{i,j}}{\%\Delta X} \qquad (2)$$

Building from these effects, and given that total state employment is $E_j = \sum_i E_{i,j}$ and GSP is $G_j = \sum_i G_{i,j}$,

it follows that that the total state employment and GSP elasticities are:

$$\varepsilon_j^{emp} = \frac{\%\Delta E_j}{\%\Delta X} = \sum_i \theta_{i,j}^{emp} \varepsilon_{i,j}^{emp} \qquad (3)$$

$$\varepsilon_j^{GSP} = \frac{\%\Delta G_j}{\%\Delta X} = \sum_i \theta_{i,j}^{GSP} \varepsilon_{i,j}^{GSP} \qquad (4)$$

where $\theta_{i,j}$ is the state employment or GSP share of sector i. The national employment and GSP effects then follow from underlying state and sector components.

$$\varepsilon^{emp} = \frac{\%\Delta E}{\%\Delta X} = \sum_j \sum_i \phi_{i,j}^{emp} \theta_{i,j}^{emp} \varepsilon_{i,j}^{emp} \qquad (5)$$

$$\varepsilon^{GSP} = \frac{\%\Delta G}{\%\Delta X} = \sum_j \sum_i \phi_{i,j}^{GSP} \theta_{i,j}^{GSP} \varepsilon_{i,j}^{GSP} \qquad (6)$$

where $\phi_{i,j}$ is the state *i* share of employment or GSP in sector *j*.

A similar set of relationships holds for changes in imports *M* and changes in total trade *T*=*M*+*X*, yielding a set of import elasticities μ and total trade elasticities τ.

$$\mu_{i,j}^{emp} = \frac{\%\Delta E_{i,j}}{\%\Delta M} \qquad \mu_{i,j}^{GSP} = \frac{\%\Delta G_{i,j}}{\%\Delta M} \qquad (7,8)$$

$$\mu_j^{emp} = \frac{\%\Delta E_j}{\%\Delta M} = \sum_i \theta_{i,j}^{emp} \mu_{i,j}^{emp} \qquad \mu_j^{GSP} = \frac{\%\Delta G_j}{\%\Delta M} = \sum_i \theta_{i,j}^{GSP} \mu_{i,j}^{GSP} \qquad (9,10)$$

$$\mu^{emp} = \frac{\%\Delta E}{\%\Delta M} = \sum_j \sum_i \phi_{i,j}^{emp} \theta_{i,j}^{emp} \mu_{i,j}^{emp} \qquad \mu^{GSP} = \frac{\%\Delta G}{\%\Delta M} = \sum_j \sum_i \phi_{i,j}^{GSP} \theta_{i,j}^{GSP} \mu_{i,j}^{GSP} \qquad (11,12)$$

$$\tau_{i,j}^{emp} = \frac{\%\Delta E_{i,j}}{\%\Delta(M+E)} \qquad \tau_{i,j}^{GSP} = \frac{\%G_{i,j}}{\%\Delta(M+E)} \qquad (13,14)$$

$$\tau_j^{cmp} = \frac{\%\Delta E_j}{\%\Delta(M+E)} = \sum_i \theta_{i,j}^{cmp}\,\tau_{i,j}^{cmp} \qquad \tau_j^{GSP} = \frac{\%\Delta E_j}{\%\Delta(M+E)} = \sum_i \theta_{i,j}^{GSP}\,\tau_{i,j}^{GSP} \tag{15,16}$$

$$\tau^{cmp} = \frac{\%\Delta E}{\%\Delta(M+E)} = \sum_j \sum_i \phi_{i,j}^{cmp}\,\theta_{i,j}^{cmp}\,\tau_{i,j}^{cmp} \qquad \tau^{GSP} = \frac{\%\Delta E}{\%\Delta(M+E)} = \sum_j \sum_i \phi_{i,j}^{GSP}\,\theta_{i} \tag{17,18}$$

Health, Education and Social Services in Canada: The Impact of the GATS

J. Anthony VanDuzer[*]

Part 1: Introduction
Part 2: Overview of the GATS
Part 3: Canada's Sector Specific Commitments That May Affect Health, Education and Social Services
Part 4: Health, Education and Social Services in Canada
Part 5: Understanding the Exclusion for "Services in the Exercise of Governmental Authority"
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Appendix 1: Selected Provisions of the General Agreement on Trade in Services
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Appendix 4: Bibliography

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[*] Associate Professor, Common Law Section, University of Ottawa. Corresponding address: vanduzer@uottawa.ca. This Chapter was prepared on behalf of International Trade Canada as a response to a request from the Standing Committee on Foreign Affairs and International Trade that research be undertaken regarding the effect of the General Agreement on Trade in Services on health, education and social services in Canada. The views expressed in this Chapter are those of the author and should not be attributed to International Trade Canada or to the Government of Canada.

1. Introduction

It is commonplace to observe that one of the ways in which Canada's multilateral trade obligations became significantly wider and deeper as a consequence of the conclusion of the Uruguay Round of trade negotiations was the General Agreement on Trade in Services (*GATS*).[1] For the first time within a multilateral framework, the GATS created general trade disciplines applying to a broad range of services.[2] The Preamble to the GATS sets out its objective as being to contribute to trade expansion "under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries." Economic theory suggests that gains from increased services trade derive from the same sources as in goods trade: increased efficiency of production from exploiting comparative advantage, economies of scale, greater competition, and improved access to production inputs (*i.e.*, producer services); consumer benefits from product differentiation (*i.e.*, wider selection and greater access to higher-quality specialized services) and lower prices; and greater economic dynamism from increased incentives for innovation and investment.

The empirical literature is at this stage unclear as to the extent of net benefits (or costs) to Canada from services trade liberalization. This reflects several factors: (a) the preliminary state of the art as regards the measurement of the height of barriers to services trade (*i.e.*, establishing the tariff equivalents of domestic regulatory measures that work to restrict market access); (b) the limited empirical evidence on the responsiveness of services trade to reductions in these barriers (*i.e.*, establishing the size of the relevant trade elasticities); and (c) the early stage of modeling services trade, particularly in terms of the interaction with investment flows. Reflecting the many unresolved modeling and measurement issues, empirical assessments of the impact on Canada of services trade liberalization show a very wide range of estimates, with one study showing Canada gaining more than any other country and another showing Canada suffering a small net loss. Most studies, however, show Canada benefiting.[3]

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[1] Annex 1B to the Marrakech Agreement establishing the World Trade Organization (1994), 33 I.L.M. 81 [*GATS*]. On its significance, see WTO Secretariat, *Guide to the Uruguay Round Agreements* (The Hague: Kluwer Law International, 1999), at 161.

[2] The rules under the original General Agreement on Tariffs and Trade [*GATT*], particularly those relating to national treatment, covered services to the extent that services were incidental to trade in goods. For example, GATT Art. III.4 refers to transportation and distribution services.

Since the GATS came into force on January 1, 1995, one of the issues that has attracted considerable public attention in Canada is the extent to which the broad reach of the GATS does or could extend to health, education and social services and, if it does, what effect GATS may have on the regulation and delivery of these services. Access to high-quality, publicly supported education and social services and especially health care is a deeply entrenched element of Canadian public policy.[4] Some have expressed concerns that the GATS and other trade agreements impose inappropriate limits on the options available to Canadian governments struggling to ensure that our systems of health, education and social services continue to serve the needs and priorities of Canadians, given the budgetary pressures that they face today.

The pressures on our health care system have received the greatest attention. Canada's cherished public system is under stress as technological change, advances in treatment, and escalating drug and other treatment costs in the context of rising demand due to an aging population collide with the fiscal limitations of Canadian governments. The strategy adopted in some provinces to respond to these challenges has been to require more health services to be paid for by patients directly and to increase private sector delivery of services in pursuit of greater efficiency and cost savings. Public debate has focused on the impact of these initiatives on the maintenance of services levels and accessibility.[5] Several major government studies have been conducted recently with a view to determining how to ensure that the Canadian system continues to function effectively.[6]

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[3] For a survey, see Z. Chen and L. Schembri, "Measuring the Barriers to Trade in Services: Literature and Methodologies," in J. M. Curtis and D. Ciuriak (eds.) *Trade Policy Research 2002* (Ottawa: Department of Foreign Affairs and International Trade, 2002), at 219-286.

[4] Canadians' commitment to their health care system cannot be overstated. In the 2002 Speech from the Throne, for example, the government said that "no issue touches Canadians more deeply than health care" and that Canada's health care system "is a practical expression of the values that define us as a country." (Governor-General of Canada, Speech from the Throne to Open the Thirty-Seventh Parliament of Canada (2003), online: The Privy Council Office http://www.pm.gc.ca/grfx/docs/sft_fe2004_e.pdf (accessed September 16, 2004).

Our education system faces similar challenges. Declining state support for post-secondary education, dramatic increases in student tuition fees, as well as, in some provinces, the growing presence of private institutions have given rise to concerns regarding access to and the quality of post-secondary education. With respect to primary and secondary education, concerns have been expressed regarding the sufficiency of resources for public schools, the diversion of scarce state resources to private schools and the consequent impact on the quality of education.[7]

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[5] M. Sanger, *Reckless Abandon: Canada, GATS and the Future of Health Care* (Ottawa: Canadian Centre for Policy Alternatives, 2002)[*Sanger*]; *Building on Values: The Future of Health Care in Canada: Final Report of the Commission on the Future of Health Care in Canada* (Ottawa: Queen's Printer, 2002)[*Romanow Report*].

[6] For example, Romanow Report, *ibid.*; Standing Senate Committee on Social Affairs, Science and Technology, *The Health Of Canadians — The Federal Role, Final Report On The State Of The Health Care System In Canada* — 6 vols. (Ottawa: Senate of Canada, 2002) [*Kirby Report*].

[7] Coalition for Public Education, Submission to the Select Standing Committee on Education; Ontario Secondary School Teachers Federation, "Private School Tax Credits – a Plan for Inequity: Response to Equity in Education Tax Credit Discussion Paper" (September 2001) online: OSSTF http://www.osstf.on.ca/www/issues/charter/Private%20school%20tax%20credits.html (accessed March 20, 2004), Canadian Union of Public Employees, "Public Risk, Private Profit: Why Lease Back Schools are Bad for K-12 Education" (May 2001) Creative Resistance: http://www.creativeresistance.ca/canada/2001-may30-public-risk-private-profit-why-lease-back-schools-are-bad-for-k-12-education-cupe-locals.htm (accessed September 16, 2004); *The Corporate Campus: Commercialization and the Dangers to Canada's Colleges and Universities*, J.L. Turk, ed. (Toronto: Lorimer, 2000). Regarding concerns related to the linkage between these concerns and international trade agreements, *see* J. Grieshaber-Otto & M. Sanger, *Perilous Lessons: The Impact of the WTO Services Agreement (GATS) on*

With respect to social services, again responding to budgetary pressures, many governments have cut back social assistance programs and toughened up eligibility criteria. These changes have sparked concerns about the adequacy and accessibility of our social services.[8]

Some critics argue that the GATS and other international trade agreements impose serious constraints on the policy choices available to Canadian governments as they seek to respond to these pressures on health, education and social services. They argue that international trade rules are pushing Canada toward a US-model health care system, which is largely privately funded and managed, encouraging the commercialization and privatization of our education system and threatening the delivery of social services.[9] While government activity in these vital areas necessarily seeks to achieve both economic and non-economic goals,[10] critics argue that the free market objectives of trade liberalization in the

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CANADA'S PUBLIC EDUCATION SYSTEM (Ottawa: Canadian Centre for Policy Alternatives, 2002) [*Grieshaber-Otto & Sanger*], at 46-84; and Elementary Teachers Federation of Ontario, "The General Agreement on Trade in Services—the GATS," (2001):http://www.bctf.bc.ca/notforsale/gats.html (accessed March 20, 2004).

[8] E. C. Smith, "Social services funding insufficient, critics say," Globe and Mail, May 19, 2004; Building an Effective New Round of WTO Negotiations: Key Issues for Canada, 19th Report of the Standing Committee on Foreign Affairs and International Trade (Jean Augustine, Chair, May 2002) [*SCFAIT Report*], online: Canadian Parliament http://www.parl.gc.ca/InfoComDoc/37/1/FAIT/Studies/Reports/faitrp19/SERVICES(accessed Sept. 16, 2004). A. Jackson & M. Sanger, *WHEN WORLDS COLLIDE: IMPLICATIONS OF INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS FOR NON-PROFIT SOCIAL SERVICES* (Ottawa: Canadian Council on Social Development and the Canadian Centre for Policy Alternatives, 2003) [*Jackson & Sanger*], at 2.

[9] *E.g.*, Canadian Federation of Nurses, "Privatization of Health Care Position Statement" (February 1998), online: Canadian Federation of Nurses http://www.nursesunions.ca/ps/privatization.shtml (accessed Sept. 16, 2004); Jackson & Sanger, *ibid.*, Grieshaber-Otto & Sanger, above note 7, at 46-84.

[10] Jake Vellinga recently concluded that all developed countries recognize that health services are not a normal market (J. Vellinga, "International Trade, Health Systems and Services: A Health Policy Perspective," in *TRADE POLICY RESEARCH 2001* (Ottawa: Department of Foreign Affairs and International Trade, 2001) 137 [*Vellinga*], at 143-144).

GATS are fundamentally incompatible with other societal goals that underlie the provision of public services.[11]

In answering the critics, the Canadian government has consistently assured Canadians that the delivery of health, public education and social services is not threatened by Canada's existing commitments under the GATS.[12] The government relies on a number of aspects of the agreement. First, the GATS contains a general exclusion from the application of all of its obligations for "services supplied in the exercise of governmental authority,"[13] (the so-called "governmental authority exclusion"). Health, education and social services within this exclusion are simply not subject to the agreement. Second, to the extent that aspects of health, education or social services are subject to the agreement, the government's position is that Canada's GATS obligations do not impair Canada's ability to maintain its current regime in these areas. In part, this is because the more onerous obligations of the GATS only apply to services that an individual WTO Member has listed in its national schedule of commitments; Canada has protected its health, education and social services by not listing them. For those sectors that are listed, Canada has negotiated some limitations that the government asserts will help to further preserve Canada's policy flexibility regarding health, education and social services. As well, the government relies on Canada's freedom to withdraw commitments in listed sectors, though any WTO Member deprived of benefits under the GATS as a result of Canada withdrawing commitments would have a corresponding right to claim compensation in the form of an adjustment of trade concessions.[14]

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[11] S. Shrybman, Opinion on Bill 11, *Health Care Promotion Act* (Alberta) (2000), online: The Canadian Union of Public Employees <http://www.cupe.ca/www/HealthCareTrade/4582> (accessed September 29, 2003) [*Shrybman Opinion*].

[12] This commitment has been expressed repeatedly by former trade Minister Pierre Pettigrew (*e.g.*, *Transparency is a Key Element in the Success of Trade Negotiations*, What the Minister Said (2002), DFAIT, http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/105386.htm (accessed June 1, 2003)) and can be found in descriptions of Canada's obligations on various government web sites (*e.g.* Industry Canada The GATS, Public Services, Health and Education, http://strategis.ic.gc.ca/epic/internet/instp-pcs.nsf/en/h_sk00151e.html (accessed June 1, 2003)) and other government communications (*e.g.*, *The Commercial Education and Training Industry: A Discussion Paper in Preparation for the World Trade Organization General Agreement on Trade in Services Negotiations* (Industry Canada, 2000), online: Industry Canada http://strategis.ic.gc.ca/SSG/sk00064ehtml (accessed May 12, 2003) [*Industry Canada - Commercial Education*]. These assurances were recently repeated by Minister Peterson in a speech given February 27, 2004: DFAIT http://webapps.dfait-maeci.gc.ca/MinPub/Publication.asp?publication_id=380810&Language=E (accessed September 16, 2004).

[13] GATS Art. I.3(b).

The critics claim that this strategy is inadequate. They argue that the exclusion for services supplied in the exercise of governmental authority is not sufficiently clear or comprehensive to exclude health, education and social services in Canada from the disciplines of the GATS because many of these services are delivered and funded privately, at least in part. They worry that provincial initiatives to expand private funding and commercial delivery of such services will have the effect of extending the scope of GATS application in these areas and, once this occurs, that Canada's GATS commitments will effectively prevent a return to public funding and delivery.[15] As well, they argue that the application of GATS rules and certain commitments made by Canada in some other sectors unduly constrain the ability of Canadian governments to regulate in the areas of health, education and social services in a manner consistent with Canadian objectives and priorities.[16] In their view, the right to withdraw commitments will not be practically useful because the costs of compensation are likely to be too steep and politically unacceptable.

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[14] Trade officials call these multiple layers of protection for health, education and social services a "belt and suspenders" or "cascading tiers of protection" approach.

[15] See, for example, Shrybman Opinion, above note 11.

[16] Among the most prominent critical analyses are S. Sinclair, *GATS: HOW THE WORLD TRADE ORGANIZATION'S NEW "SERVICES" NEGOTIATIONS THREATEN DEMOCRACY* (Ottawa: Canadian Centre for Policy Alternatives, 2000); Grieshaber-Otto & Sanger, *supra* note 7; Sanger, *supra* note 5; and J. Grieshaber-Otto & S. Sinclair, *FACING THE FACTS: A GUIDE TO THE GATS DEBATE* (Ottawa: Canadian Centre for Policy Alternatives, 2002) [*Grieshaber-Otto & Sinclair*].

Reflecting these various concerns, the Standing Committee on Foreign Affairs and International Trade recommended that research be undertaken regarding the effect of the GATS on health, education and social services in Canada. In its response to the Committee report, the federal government undertook

> to commission a study regarding the impacts of Canada's current commitments under the GATS on the effective provision by Canadian governments of health, education and social services and on the Canadian regulatory structure affecting them.[17]

This study responds to this undertaking in the following way. It interprets the scope of the exemption for "services supplied in the exercise of governmental authority" to define the criteria for its availability, and then applies these criteria to the existing structures of regulation and methods of services delivery in the areas of health, education and social services to ascertain the extent to which these services are subject to the GATS. For the aspects of health, education and social services to which the GATS does apply, the effect of Canada's current GATS obligations is analyzed.

As more fully elaborated below, the study concludes that the governmental authority exclusion does not exclude all the aspects of what we commonly consider health, education and social services, but few aspects of the public provision of these services would be construed as subject to the GATS. This study concludes that a strong case can be made that public funding for health care, hospitals, public schools and major social programs, like Employment Insurance and social assistance, are all excluded. To the extent that the GATS has application to health, education and social services, most of the concerns expressed regarding the threats that GATS obligations represent to the effective provision by Canadian governments of health, education and social services and to the regulatory structures governing them appear unfounded. The analysis of health, education and social services undertaken in this study found no basis for any challenge to the manner in which these services are currently delivered or the schemes by which they are regulated. As well, GATS obligations impose few constraints on the ability of federal, provincial and territorial governments to change the nature and extent of regulation in the future. However, GATS obligations will have to be taken into account in relation to some kinds of policy initiatives. For example, expanding public funding to cover additional health services that are insured by private firms is one important area where Canada's GATS obligations may have an impact. Also, where foreign suppliers are permitted to enter the market, the GATS will impose some constraints on the ability of Canadian governments to treat suppliers from one WTO Member less favourably than those from another country.

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[17] SCFAIT Report, above note 8, Recommendation 20.

It must be admitted that the governmental authority exclusion and the other provisions of the GATS are broadly worded and their legal impact largely untested in the WTO dispute settlement process. This means that the conclusions in this study cannot be considered definitive. As well, in a general study such as this, it was not possible to review exhaustively all Canadian measures relating to health, education and social services. Further research on the specific characteristics of our complex and evolving systems of funding and delivering health, education and social services would assist to better understand the possible application of the GATS in these areas. Even with further work of this kind, however, understanding the effective scope of GATS obligations will depend on the progressive clarification of GATS provisions as cases proceed through the WTO dispute settlement system. So far, only a handful of cases have addressed the Agreement.

While the scope of this study is broad, it has several important limitations. First, it does not address the prospective impact of the current round of WTO services negotiations.[18] Second, it does not inquire into the impact of the services and investment provisions in the NAFTA or those in Canada's other international trade treaties. Third, it does not examine the interaction between the GATS and Canada's other international trade obligations. Consideration of these issues might reveal additional constraints on the effective room for Canadian governments to regulate in the areas of health, education and social services.

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[18] The services negotiations were mandated by the GATS itself (Art. XX). The process was set by the Members in Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, at para. 15. By June 2002, Members were to have tabled their initial requests for market access. As of the end of March 2003, the Members were to have tabled requests initial offers of improved market access. Concurrently, discussions are going on relating to the expansion of the disciplines in the GATS. Negotiations are continuing with a view to concluding an agreement as part of the Doha Round in 2005.

2. Overview of the GATS

(a) Introduction

The GATS is a complex agreement. In order to understand to what extent it may affect health, education and social services delivery in Canada, it is essential to begin with an examination of the architecture of the agreement and the basic nature of its provisions.

The GATS preamble describes the purposes and objectives of the agreement, in part, in the following terms:

> *Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;
>
> *Desiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;
>
> *Recognizing* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives,...[19]

GATS Article I defines the scope of application of the agreement in broad terms. It states that the GATS applies to all measures[20] "affecting trade in services"[21] taken by "central, regional or local governments and authorities[,] and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities." For this purpose, non-governmental bodies would include independent agencies and commissions exercising powers delegated by any level of government in Canada.[22] Under the GATS, "services" include any service in any sector, subject to the limitations described below.[23]

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[19] The full text of the preamble is set out in Appendix 1 to this study. "Member" refers to a WTO Member state.

[20] "Measures" are defined to mean "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, adminis-

As noted, a key provision defining the scope of the Agreement is the exclusion contained in GATS Article I.3(b) for services "supplied in the exercise of governmental authority." Health, education and social services that fall within this exclusion are outside the scope of the Agreement altogether.[24] To fall within this exclusion, a service must meet two conditions set

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trative action, or any other form" (GATS Art. XXVIII(a)).

[21] The panel in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al.)* (1997), WTO Doc. WT/DS27/R/ECU [*EU – Bananas*] (Panel Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996> (date accessed March 8, 2003) held that

> the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'. … We also note that Article I:3(b) of the GATS provides that "services' includes any service in any sector except services supplied in the exercise of governmental authority' (emphasis added), and that Article XXVIII(b) of the GATS provides that the 'supply of a service' includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application for the GATS. (at para. 7.285).

[22] M. Trebilcock and R. Howse, *The Regulation of International Trade*, 2d ed. (London: Routledge, 1999), at 229-230. The text leaves unclear whether obligations apply to private enterprises exercising regulatory powers without any formal delegation from the state.

[23] GATS Art. I.3(b).

[24] As discussed below, specific commitments in other sectors may have an impact on the conditions in which services providers in these areas operate. See below, notes 71-76 and accompanying text.

out in GATS Article I.3(c), namely that the service is "supplied neither on a commercial basis, nor in competition with one or more service suppliers."

There is one further proviso regarding the governmental services exclusion: insofar as government programs providing for the public funding of a particular program affect financial services, the application of the governmental authority exclusion would be governed by provisions in the GATS Annex on Financial Services. Government funding of health services, for example, may affect private suppliers of insurance services. The Annex, which is an integral part of the Agreement, contains some different requirements regarding the scope of the governmental authority exclusion as it relates to measures affecting financial services.[25]

With respect to services subject to the GATS, the Agreement creates both a general framework of obligations that apply to all services and a set of specific commitments regarding the treatment of particular services that a WTO Member has agreed to list in a national schedule of commitments. The most important general rule is the obligation to grant most-favoured-nation (*MFN*) treatment to services and service suppliers of other WTO Members. This means that Members must treat services and service suppliers from other Members no less favourably than those from any other country (Member or non-Member). For this obligation to apply, the services or service suppliers must be in the same category. In the language of the WTO agreements, they must be "like." For every service that is listed in its national schedule, a Member commits to a higher level of obligation. For these services only, Canada must grant services and service suppliers from other WTO Members national treatment (meaning treatment no less favourable than the treatment of like domestic businesses) and cannot impose certain restrictions on market access.

The national treatment and market access obligations for listed sectors may be circumscribed by specific limitations inscribed by each Member in its schedule. Consequently, listing a sector does not necessarily give foreign service suppliers an unrestricted right to enter the national market or to do business as they please. The terms on which the sector has been listed in a national schedule must be examined to determine the substantive nature of the obligation.

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[25] See below notes 317-332 and accompanying text. The relevant provisions of the Annex on Financial Services are set out in Appendix I to this study.

Finally, for listed sectors, the Member's regulatory regime must meet specified standards, including a requirement that measures affecting trade in services be administered in a reasonable, objective and impartial manner.

The remainder of this Section 2 provides a more detailed discussion of GATS obligations.

(b) Modes of Supply

Subject to the governmental authority exclusion and some exceptions discussed below, the GATS applies to all internationally traded services, however delivered. The term "services" is not defined.[26] Instead, the GATS simply states that it includes any service in any sector and that the Agreement applies to measures affecting trade in services. Trade in services is defined as the supply of a service in any of the following four modes of supply.

> *Cross-border supply* (mode 1) – A service is supplied from the territory of one WTO Member into the territory of any other Member (*e.g.*, a lawyer in the United States gives advice over the telephone to a client in Canada).
>
> *Consumption abroad* (mode 2) – A service is supplied in the territory of one Member to a service consumer of any other Member (*e.g.*, a Canadian goes to the US to stay at a hotel).
>
> *Commercial presence* (mode 3) – A service is supplied by a service supplier of one Member through a commercial presence in the territory of any other Member (*e.g.*, an American computer training business sets up a campus and delivers courses in Canada).
>
> *Presence of natural persons* (mode 4) – A service is supplied by a service supplier of one Member through the presence of natural persons of a Member in the territory of any other

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[26] Although attempts were made early in the negotiations to develop a definition, these were abandoned when it became apparent that no single useful definition was possible (GATS 2000, see below note 65).

Member (*e.g.*, an individual American computer programmer enters Canada on a temporary basis to deliver seminars on his or her own behalf or a US-based employee of a US firm enters Canada to do some work for the American computer training business referred to in the previous example).[27]

For the purposes of mode 4, no time period for the entry of natural persons is defined in the GATS. A review of commitments undertaken by individual Members relating to mode 4 indicates that Members have committed to temporary entry for periods ranging from weeks to as long as several years, depending on the type of service provider and the purpose of entry.[28] The GATS expressly provides that it does not apply to measures affecting natural persons seeking access to the employment market of a Member, nor to measures regarding residency, citizenship or employment on a permanent basis.[29]

(c) Obligations Applying to All Sectors

Most-Favoured-Nation

Once the GATS is found to apply to a particular service, Article II obliges Members to provide most-favoured-nation (*MFN*) treatment. A Member must not discriminate between services or service suppliers of other Members; it must accord to the services and service suppliers of each Member treatment no less favourable than it accords to like services and service suppliers of any country.[30] The GATS MFN obligation has been interpreted by the WTO Appellate Body as requiring that measures do not discriminate in their express terms (*de jure* discrimination) or in the way they operate in practice (*de facto* discrimination), even where the measures are neutral on their face.[31]

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[27] All the examples are imports of US services into Canada. If the nationality of the services suppliers and services consumers were reversed, the examples would be exports of services from Canada.

[28] See, for example, India – Schedule of Specific Commitments, Supplement 2 (GATS/SC/42/Suppl.2 (July 28, 1995)), at 4.

[29] GATS Annex on the Movement of Natural Persons.

[30] This obligation replicates for services the GATT Article I obligation for goods.

Under the GATS, Members are permitted to record one-time exemptions from the MFN obligation in their national schedules at the time they become Members of the WTO.[32] Many exemptions filed, including those filed by Canada, list existing bilateral and regional preferential arrangements.[33]

The GATS MFN requirement is also qualified by the Agreement's Article V, which permits Members to enter into bilateral or regional agreements to liberalize trade in services under prescribed conditions, notwithstanding that these agreements give preferences inconsistent with the MFN obligation. To qualify for the Article V exemption, regional agreements must have "substantial" sectoral coverage, in terms of the number of sectors, volume of trade and modes of supply covered, and provide for the elimination of substantially all discriminatory measures affecting the services trade of the parties, meaning measures providing for less than national treatment or less than MFN treatment. To be exempt, an agreement must be designed to facilitate trade between the parties to the agreement and not to raise the overall level of barriers to trade in services faced by Members who are not party to the agreement.

Transparency

Article III of the GATS requires Canada to publish promptly all relevant measures of general application that pertain to, or affect the operation of, the GATS. Bilateral or plurilateral agreements that affect services trade must also be published. Canada is obliged, as well, to respond to requests from other Members for information regarding these measures or agreements. There are enhanced transparency obligations for sectors that Canada has listed in its national schedule of commitments, as discussed below.

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[31] *EU – Bananas*, above note 21, at 231, 233 & 234. This finding is discussed in H.A. Milan Smitmans, "Dispute Settlement in the Services Area under GATS," in *SERVICES TRADE IN THE WESTERN HEMISPHERE: LIBERALIZATION, INTEGRATION AND REFORM*, Sherry M. Stephenson, ed. (Washington, D.C.: Brookings Institution Press, 2001), at 112-115.

[32] GATS Art. II.2 and Annex on Article II Exemptions.

[33] Canada - Final List of Article II Exemptions ((1994) GATS/EL/16) and Supplements 1 and 2.

Judicial Review

Article VI.2 of GATS requires Canada to "maintain or institute judicial, arbitral or administrative tribunals or procedures" that provide for the prompt review of administrative decisions affecting trade in services by objective and impartial decision makers with the power to award appropriate remedies where such remedies are justified.

Recognition

Canada is free to choose whether to recognize the educational and other qualifications obtained by a service provider in another country as fulfilling Canadian standards for the authorization, licensing or certification of service suppliers. If Canada decides to recognize the qualifications obtained in one country, whether pursuant to a bilateral agreement with that country or to a less formal arrangement, Canada must provide an adequate opportunity to WTO Members to negotiate accession to the agreement or to negotiate a comparable arrangement. Where Canada has accorded recognition unilaterally to qualifications obtained in one country, it must provide an adequate opportunity to Members to demonstrate that qualifications obtained in their jurisdictions should also be recognized in Canada.[34]

As well, the GATS requires that recognition not be accorded in a discriminatory manner, or operate as a disguised restriction on trade. Recognition should be based on multilaterally agreed rules where appropriate.[35] All recognition measures must be notified to the Council for Trade in Services.[36]

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[34] GATS Art. VII.

[35] See *e.g.*, *Convention on the Recognition of Qualifications Concerning Higher Education in the European Region* [*Recognition of European Qualifications Treaty*], co-sponsored by the Council of Europe and UNESCO, which was concluded in April 1997 to facilitate international exchanges of students and scholars by establishing standards for the international evaluation of secondary and post-secondary credentials. Signatories

Monopolies and Exclusive Service Suppliers

In accordance with GATS Article VIII, Canada is committed to ensuring that any monopoly or exclusive service supplier, such as a provider of postal services, observes the MFN requirement, as well as any specific commitment undertaken in its national schedule of commitments. This obligation extends to exclusive suppliers of services where Canada formally or effectively authorizes or establishes a small number of service suppliers and substantially prevents competition among them in its territory.

Where a monopoly or exclusive service supplier in Canada competes in the supply of a service that is outside the scope of its monopoly rights in a sector listed in Canada's national schedule, Canada must ensure that the monopoly supplier does not abuse its monopoly position. Abuse would include, for example, subsidizing its activities in the competitive market from its monopoly profits.[37]

Restrictive Business Practices

Unlike the GATT, the GATS addresses restrictive business practices by service suppliers, though the concrete obligations are minimal. Article X requires a Member, on the request of

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include the European Union, many Eastern European countries, Australia, Israel, and the United States, as well as Canada.

[36] The *Recognition of European Qualifications Treaty*, *ibid.*, was notified to the WTO, Council for Trade in Services, *International Regulatory Initiatives in Services – Background Note by the Secretariat* (1 March 1999), WTO Doc. S/C/W/97. The Council on Trade in Services is the body of the WTO charged with facilitating the operation of the GATS and furthering its objectives (GATS Arts. XXII and XXIV).

[37] GATS Art. VIII.2. If Canada intends to grant monopoly rights with respect to the supply of a service covered by its specific commitments, it must notify the Council for Trade in Services at least three (3) months before implementing the monopoly. As well, the obligations with respect to modification of schedules would apply (GATS Art. VIII.5, see below note 49 and accompanying text). Some guidance on what constitutes and anti-competitive act was recently provided in *Mexico – Measures Affecting Telecommunications Services (Complaint by the United States)* (2004), WTO Doc. WT/DS204/R (Panel Report), WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000> (date accessed: 24 April 2004)[*Mexico – Telecommunications*], at para. 7.238.

another Member, to consult in relation to domestic restrictive practices by a service supplier of the Member with a view to eliminating such practices. A Member receiving a request must cooperate by providing non-confidential information. Confidential information must be provided only where a satisfactory agreement safeguarding confidentiality has been concluded.

(d) Obligations Applicable to Sectors Listed in Canada's National Schedule

Structure of Market Access and National Treatment Commitments

By listing a service in its national schedule, Canada committed itself to a higher level of obligation under the GATS, including commitments to give market access and national treatment.[38] On the basis of negotiations, Canada, like every other WTO Member, customized the precise level of market access and national treatment to which it would be bound at the time it became a Member of the WTO by choosing which sectors to list in its national schedule as well as by recording limitations on its obligations.[39] Limitations are recorded separately in relation to each of the four modes of service supply. They may take the form of a total exclusion of any obligation for one or more modes of supply, in which case the notation would read "unbound." Alternatively, limitations may describe specific conditions qualifying the extent of the Member's commitment in relation to a particular mode of supply.[40] Limitations may be recorded either as "horizontal," meaning that they apply to a particular mode of supply for *all* listed services or only in relation to particular services. For example, with respect to commercial presence (mode 3) Canada recorded in its schedule a horizontal limitation describing the requirement for acquisitions above a certain dollar threshold in all sectors to be reviewed under the *Investment Canada Act.*[41]

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[38] Though there is no requirement to do so, Members with few exceptions prepared their GATS schedules based on a sectoral classification developed during the Uruguay Round of multilateral trade negotiations that divides services into 12 sectors, which are broken down into 54 sub-sectors. Sub-sectors are further disaggregated into 161 activities. GATT, *Services Sectoral Classification List: Note by the Secretariat* (10 July 1991), GATT Doc. MTN.GNS/W/120 [*W/120*]. This classification is based on the United Nations *Statistical Paper Series M No. 77, Provisional Central Product Classification* (New York: Department of International Economic and Social Affairs, Statistical Office of the United Nations, 1991)[*Provisional CPC*]. Some Members, including the US, deviated from the Secretariat's classification system to some extent but most Members identified the services with respect to which they were assuming obligations by reference to the Secretariat's classification and the Provisional CPC. The Provisional CPC itself has since been revised (see online: United Nations http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=16 (accessed November 8, 2003).

[39] As a founding member of the WTO, Canada filed its schedule of commitments as part of the completion of the Uruguay Round. Negotiations continued after the end of the Round in the areas of financial services, basic

In short, by listing a service in its schedule Canada committed to accord in relation to that service and to suppliers of that service both market access and national treatment, with respect to each of the four modes of service supply, but subject to any limitation recorded in the schedule itself. Canada remains free under the GATS to introduce new measures that would be inconsistent with national treatment and market access obligations (a) for any unlisted service and (b) in the case of a listed service, for any particular mode of supply described in Canada's schedule as "unbound" or to the extent permitted by any more specific limitation that Canada has written into its schedule.

National Treatment

Under the GATS, the national treatment obligation requires that a WTO Member treat services and service suppliers of other Members no less favourably than its own like services and service sup-

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telecommunications, the movement of natural persons, and maritime transport. In the first three of these areas, additional commitments by some Members were made subsequently.

[40] For example, in listing insurance services, Canada specified that market entry could only be through a commercial presence. See Canada's Schedule of Specific Commitments, Supplement 4, rev. 1 (GATS/SC/16/Supp. 4/rev.1, 6 June 2000). The full text of this commitment is set out in Appendix III to this study.

[41] R.S.C. 1985, c. 28 (1st Supp.).

pliers.[42] National treatment does not necessarily require formally identical treatment. Article XVII.3 establishes that the real test of national treatment is equality in "conditions of competition."[43] Thus, like the MFN obligation, the national treatment obligation prohibits both *de jure* and *de facto* discrimination. But whereas the GATT national treatment provision is powerful, applying to virtually all goods without exception, the GATS national treatment obligation applies only to those services Canada has listed in its national schedule. As well, Canada's national treatment commitments are qualified by horizontal and sector-specific limitations.

Market Access Commitments

For services listed in its national schedule, Canada must provide market access, meaning that it must not impose the specific restrictions on market access set out in the box below, unless permitted by limitations inscribed in its schedule.[44] In other words, where Canada wished to maintain, or be able to adopt, a domestic measure inconsistent with these market access obligations in relation to a listed service, Canada had to use express language to preserve this flexibility. In some cases, Canada, like other Members, simply described the requirements of its existing regime as a way of ensuring that the regime would be consistent with the GATS.

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[42] GATS Art. XVII. The meaning of "like services" and "like services suppliers" is discussed below (see notes 398-403 and accompanying text).

[43] GATS Art. XVII.2, 3. GATT Art. III refers only to "like" rather than "competing", though Ad Art. III.2 refers to the goods being in competition as a condition of finding a breach of Art. III.2. "Like" is not itself unambiguous, as is evident from GATT dispute settlement cases, many of which have revolved around alleged differences in treatment of like imported and domestic products. The wording and structure of the national treatment obligations in GATT and GATS are different in ways that may result in different interpretations. On the nature of the national treatment obligation see G. Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (Oxford: Hart, 2002) [*Verhoosel*].

[44] GATS Art. XVI.1.

Market Access Restrictions Prohibited Under GATS Article XVII

Limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.

Limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test.

Limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units whether in the form of quotas or the requirement of an economic needs test.

Limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test.

Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share holding or the total value of individual or aggregate foreign investment.

Other Obligations Relating to Listed Services Sectors and Activities

International Transfers and Payments: In relation to services listed in its national schedule, Canada may not frustrate the implementation of its obligations and commitments by imposing restrictions on international transfers of funds and payments to settle current transactions.[45]

Enhanced Transparency Obligations: In addition to the publication obligation mentioned above in relation to all measures of general application that pertain to or affect the operation of the Agreement, GATS Article III requires Canada promptly, and at least once every year, to inform the WTO of the introduction of any new law, regulation or administrative guideline that significantly affects trade in services that Canada has listed in its national schedule, as well as changes to existing laws, regulations and administrative guidelines having such effect. Canada must also establish one or more inquiry points to provide specific information to other Members regarding its services regime in relation to services Canada has listed. The GATS does not oblige Canada to disclose confidential information, the publication of which would impede law enforcement or otherwise conflict with the public interest or which would prejudice legitimate commercial interests.[46]

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[45] GATS Articles XI and XII. However, in a situation of balance-of-payments emergency, temporary restrictions on trade in services, including restrictions on payments related to services trade, may be instituted. Article XII imposes the same conditions and multilateral monitoring requirements on balance-of-payments restrictions in respect of services trade as those imposed by the GATT in respect of goods trade.

Domestic Regulation: For listed services, Canada must ensure that all measures of general application are administered in a reasonable, objective and impartial manner. Measures relating to qualification requirements and procedures, technical standards and licensing requirements must not nullify or impair Canada's specific commitments in listed sectors by imposing requirements or standards not based on objective and transparent criteria, such as competence and ability to provide the service, or that are more burdensome than necessary to ensure the quality of the service. In the case of licensing procedures, the procedures themselves must not be a restriction on the supply of a service.[47] Where authorization is required to provide a service, Canada must, within a reasonable time, inform applicants for authorization whether the authorization has been granted.[48]

(e) Modification of Schedules and Granting of New Monopoly Rights

Under GATS Article XXI, Canada may withdraw trade concessions made in its national schedule in relation to any service at any time on three (3) months' notice to the WTO Council on Trade in Services. Where a WTO Member feels the withdrawal may affect the benefits it receives under the agreement, it may request that Canada enter into negotiations with a view to agreeing on a compensating adjustment in the form of other trade concessions. In the event of failed compensation negotiations, the affected Member may seek arbitration. Where arbitration has been requested, Canada may not make the modification until it has given trade compensation in accordance with the arbitration award. Compensatory adjustments would have to be extended to all WTO Members on an MFN basis. If Canada does not comply with these requirements, any Member that participated in the arbitration may withdraw substantially equivalent concessions in retaliation. If arbitration is not requested by an affected Member, Canada is free to implement the proposed change to its schedule of commitments.

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[46] GATS Art. III *bis*.

[47] GATS Arts. VI.4, VI.5.

[48] GATS Art. VI.3.

If Canada decides to grant new monopoly rights with respect to the supply of a service covered by its specific commitments, it must notify the Council for Trade in Services at least three (3) months before implementing the monopoly. In such event, the obligations described above with respect to the modification of schedules, including compensation, would apply.[49]

(f) Exceptions and Unfinished Business

General Exceptions

GATS Articles XIV and XIV*bis* allow Canada to impose measures that would otherwise be inconsistent with the GATS to protect important national interests.[50] One exception specifically addresses measures related to health in the following terms:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (b) necessary to protect human, animal or plant life or health…

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[49] GATS Art. VIII.5.

[50] Most of the exceptions are analogous to those found in GATT Articles XXI and XX and are likely to be interpreted similarly. GATS Art. XIV provides that measures necessary to ensure compliance with laws protecting privacy of personal data and safety and to prevent deceptive and fraudulent practices or the effects of defaults in services contracts are also exempt, so long as the laws themselves are not inconsistent with the GATS. Certain tax measures are exempt as well.

This exception has never been tested in a GATS context. Some light on how effectively it might be used in services trade disputes is shed by the effectiveness of the similarly worded exception under GATT Article XX(b) in disputes involving trade in goods. In the latter context, GATT/WTO dispute settlement panels and the WTO Appellate Body have said that the availability of the exception depends upon the satisfaction of a three-step test:

1. Is the challenged measure designed to protect health?
2. Can the measure be provisionally justified as necessary to protect human health, meaning there is no other less trade restrictive way to protect health?
3. If so, can it be justified under the "chapeau" of Article XX, which requires that the measure not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, and not be a disguised restriction on trade?[51]

Early dispute settlement decisions dealing with GATT Article XX determined that, as an exception to the obligations otherwise imposed, the burden of demonstrating that a measure falls within GATT Article XX is on the Member seeking to rely on it and some decisions suggested that the exception should be interpreted narrowly.[52] In a recent case, however, the Appellate Body has cast doubt on whether it is necessary to adopt a special narrow approach to the interpretation of the general exceptions at all.[53]

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[51] *United States – Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela and Brazil)* (1996), WTO Doc. WT/DS2/VEN, WT/DS4/BRA, www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1995 (accessed June 2, 2003) [*US Gasoline*]; *United States – Section 337 of the Tariff Act of 1930* (*Complaint by EC*) (1989), GATT Doc. L/6439, 36th Supp. B.I.S.D. (1990) 393 [*US – Section 337*], http://www.wto.org/english/tratop_e/dispu_e/87tar337.wpf (accessed November 26, 2003); *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (*Complaint by US*) (1990), GATT Doc. DS10/R, B.I.S.D., 37th Supp. (1991) 200 [*Thai – Cigarettes*], http://www.wto.org/english/tratop_e/dispu_e/90cigart.wpf (accessed November 26, 2003). These cases are discussed in C. Correa, "Implementing National Public Health Policies in the Framework of WTO Agreements," (2000) 34 J. World T. 89.

[52] *E.g.*, *Thai – Cigarettes*, *ibid.*

[53] *European Communities – Measures Concerning Meat and Meat*

In general, in determining whether a measure is necessary for the purposes of the exception under the GATT, a WTO Panel or the Appellate Body will consider a number of parameters including the values sought to be protected by the measure.[54] In its recent decision in the *Asbestos* case,[55] the Appellate Body denied Canada's challenge to French restrictions on asbestos imports. In the course of setting out its reasoning, the Appellate Body said the more vital or important the public policy objectives sought to be achieved by the measure, the easier it would be to find that the measure was necessary. The Appellate Body recognized that human health was "important in the highest degree."[56]

Some have suggested that this case marked an expansion of the circumstances in which the exception would be available. The Appellate Body held that, in considering whether the measure was necessary to protect health, it had to consider only the existence of alternatives that were reasonably available to the importing Member taking into account economic and administrative considerations. In the circumstances, no alternative to an absolute ban on asbestos imports was found to be reasonably

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Products (Hormones) (Complaint by the United States and Canada) (1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R at para. 104 (Appellate Body Report), <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996> (date accessed May 27, 2003): "merely, characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision that would not be warranted…by applying the normal rule of treaty interpretation."

[54] *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (Complaints by United States and Australia)* (2001) WTO Doc. WT/DS/161/AB/R, WT/DS/169/AB/R (Appellate Body Reports) online: WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1999> (date accessed July 27, 2004)[*Korea – Beef*], at para. 161-163..

[55] *European Communities – Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)* (2001), WTO Doc. WT/DS135/AB/R (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1998> (date accessed June 4, 2003) [*EU – Asbestos*]. The Appellate Body also considered that the health risk associated with asbestos compared to other products was relevant to determining if asbestos and the other products were like goods.

[56] *EU – Asbestos*, *ibid.*, at para. 172.

available. Those arguing that *Asbestos* represents a relaxation of the requirements for the availability of the exception suggest that in previous cases the burden of possible alternatives on the importing state has been given relatively less weight.[57] In light of the small number of cases that have engaged in a substantial analysis of GATT Article XX, however, any such generalization must be regarded with some scepticism.

Indeed, it is hard to generalize about the circumstances in which the GATS Article XIV(b) exception would be available to defeat a challenge to a Canadian measure relating to the health care system. How the exception is interpreted will depend very much on the facts of each case. Nevertheless, relying on the exception would involve certain challenges.

Applying the approach adopted in cases decided under the GATT, a measure will only be found to be necessary for the purposes of the exception where there is no less trade restrictive way to protect health that is reasonably available. While arguments may be made about how effectively particular Canadian measures related to health care delivery and regulation promote health, it might be difficult to defend a particular aspect of the existing Canadian system as necessary (as opposed to desirable) since a wide range of alternative approaches to regulation and delivery are employed throughout Canada as well as in other countries. A WTO panel considering a challenge to a Canadian measure would enquire into various possible ways of satisfying Canada's health objectives. As long as some alternative was reasonably available, the panel would find that a measure otherwise inconsistent with Canada's trade obligations was not necessary to protect health and, as a result, not within the exception.[58]

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[57] *E.g.*, see T. Sullivan & E. Shainblum, "Trading in Health: The World Trade Organization and the International Regulation of Health and Safety" (2001) 22 Health L. Can. 29. These authors compare *EU – Asbestos*, *ibid.*, to *Thai – Cigarettes*, and other cases cited above note 51.

[58] So, for example, the panel in the *Thai – Cigarettes* case, above note 51, found that Thailand's ban on imported cigarettes was not necessary to promote health because other alternatives were reasonably available (at para. 79-81). See also *United States – Restrictions on Imports of Tuna (Complaint by the European Communities)* (1994), GATT Doc. DS29/R (June 16, 1994),

Even if a measure is necessary, the exception is not available if the measure constitutes "arbitrary" discrimination, "unjustifiable" discrimination or a "disguised restriction on international trade" within the meaning of the "chapeau" of Article XIV. Applying the identical test in the goods context has been described by the Appellate Body as

> …essentially the delicate [task] of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions … of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[59]

Government Procurement

GATS Article XIII explicitly excludes procurement of services by governments and their agencies from the general MFN obligation as well as from any specific market access and national treatment commitment entered into in national schedules so long as the services are purchased for "government purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale."[60] The GATS commits Members to negotiations on government procurement.

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33 I.L.M. 839 (1994) [*US – Tuna*].

[59] *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Malaysia)* (2001), WTO Doc. WT/DS58/AB/R online: WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996> (date accessed July 27, 2004), at para. 159.

[60] Notwithstanding this "blanket" exception, some national schedules show "horizontal limitations" on national treatment and market access for government procurement. Presumably such limitations are inserted for greater clarity and, perhaps, to allay the concerns of domestic interests, since they are not required.

A round of negotiations that began in January 1997 has not yet reached any conclusion.[61] Canada is a party to the plurilateral Agreement on Government Procurement,[62] which covers services, but its obligations under this agreement do not relate to health, education and social services delivered to the public.

As noted in the introduction, this study does not deal with the application of Canada's international obligations regarding procurement. The dividing line between government procurement measures excluded by Article XIII and government funding measures subject to the GATS, however, is a difficult one to draw, especially in the areas of health, education and social services. As a result, this issue is addressed briefly below in Section 7 of this study.[63]

Subsidies

GATS Article XV on subsidies provides that Members would negotiate disciplines after the end of the Uruguay Round. Negotiations have commenced, but no resolution has been reached.[64] The only other obligation specific to subsidies is that any Member adversely affected by another Member's subsidy practices may request consultations with that other Member.

Despite this provision and the ongoing negotiations, it is clear that the GATS already applies to subsidies. The GATS applies to measures affecting trade in services. Government subsidy programs are measures. The MFN obligation precludes discrimination between like foreign services and service suppliers in awarding subsidies. Where the obligation to provide national treatment applies, Canada would be prevented from discriminating against foreign service suppliers in awarding subsidies.[65] As discussed below in Sections 3 and 7 of this study, Canada has preserved some freedom with respect to the granting of subsidies that would otherwise be inconsistent with national treatment by recording limitations on its obligations in its national schedule of commitments.

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[61] The negotiating group is still working on developing a work plan. See WTO, Council for Trade in Services, *Special Session, Report of Meeting* (held on 9 December 2002-13 January 2003), WTO Doc. TN/S/M/5 [*December 2002 Meeting of Services Council*] at 15; and WTO, Council for Trade in Services, *Special Session, Report of Meeting* (held on 4 and 10 July 2003 and 3 September 2003), WTO Doc. TN/S/M/8 [*July 2003 Meeting of Services Council*], at 35.

[62] Forming part of Annex 4 to the Marrakech Agreement establishing the World Trade Organization (1994) 33 I. L. M. 81.

[63] See below, notes 394-397 and accompanying text.

[64] December 2002 Meeting of Services Council, above note 61, at 15; and July 2003 Meeting of Services Council, above note 61, at 35.

(g) Dispute Settlement

Together with the various agreements pertaining to trade in goods, and the Agreement on Trade-Related Intellectual Property Rights, the GATS is an integral part of the WTO's legal instruments and is subject to the WTO's dispute settlement procedures under the Dispute Settlement Understanding (*DSU*).[66] A WTO Member that claims Canada has failed to comply with its obligations under the GATS may initiate dispute settlement proceedings.[67] If it is found that Canada has failed to comply, Canada is expected to bring the challenged measure into conformity. If it fails to do so, Canada must enter into negotiations with a view to agreeing on mutually acceptable compensation in the form of trade concessions or face the prospect that the complaining party will retaliate by removing trade concessions from which Canada benefits.[68] With respect to disputes relating to obligations under the GATS, however, the Dispute Settlement Body must only permit the removal of concessions where it thinks the breach was sufficiently serious.[69] This requirement only applies in relation to disputes under the GATS. To date, there have been few dispute settlement cases dealing with GATS.[70]

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[65] G. Gauthier with E. O'Brien & S. Spencer, "Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade," [*Gauthier*] in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION*, P. Sauvé & R.M. Stern (eds), (Washington, D.C.: Brookings Institution Press, 2000) [*GATS* 2000], at 165, 177. The scope of this obligation is not clear. To what extent does it apply, for example, regardless of the mode of supply? Subsidies are discussed below (notes 390-393 and accompanying text).

[66] GATS Art. XXII. Under the WTO, disputes are governed under the Dispute Settlement Understanding forming Annex 2 to the Marrakech Agreement establishing the World Trade Organization (1994) 33 I.L.M. 81. Disputes relating to GATS are also subject to the Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services that provides for the establishment of a special roster of panellists with expertise relating to trade in services or GATS. The Decision is reprinted in GATT Secretariat, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* (Geneva: GATT Secretariat, 1994), at 457.

[67] GATS Art. XXII.

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[68] For a general discussion of the dispute settlement process see *Dispute Resolution in the World Trade Organization*, J. Cameron & K. Campbell (eds) (London: Cameron May, 1998); W.J. Davey, "The WTO Dispute Settlement System" (2000) 3 J. Int'l. Econ. L. 15; P. Mavroidis & D. Palmeter, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge, Mass.: Kluwer Law International, 1999).

[69] GATS Art. XXIII.2.

[70] The following cases have been brought in relation to GATS provisions: *EU – Bananas*, above note 21, *Canada – Certain Measures Concerning Periodicals* (*Complaint by the United States*) (1997), WTO Doc. WT/DS31/R, WT/DS31/AB/R (Panel Report and Appellate Body Report), [*Canada – Periodicals*]; *United States – The Cuban Liberty and Democratic Solidarity Act (Complaint by the European Communities)* (1996), WTO Doc. WT/DS38/6, *Japan – Measures Affecting Distribution Services (Complaint by the United States)* (1996), WTO Doc. WT/DS45/Add.1; *Belgium – Measures Affecting Commercial Telephone Directory Services (Complaint by the United States)* (1997), WTO Doc. WT/DS80/1; *Canada – Measures Affecting Film Distribution Services (Complaint by the European Communities)* (1998), WTO Doc. WT/DS117/1; *Canada – Certain Measures Affecting the Automobile Industry* (*Complaints by Japan and the European Communities*) (2000), WTO Doc. WT/DS139, 142/R, WT/DS139, 142/AB/R (Panel Report and Appellate Body Report), [*Canada-Autopact*]; *Nicaragua – Measures Affecting Imports from Honduras and Colombia* (*Complaint by Honduras*) (2000) WTO Doc. WT/DS201/1; *Mexico – Telecommunications*, above note 37; *Turkey – Certain Import Procedures for Fresh Fruit* (*Complaint by Ecuador*) (2002), WTO Doc. WT/DS237/4; *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (*Complaint by Canada*) (2003), WTO Doc. WT/DS277/2; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*Complaint by Antigua and Barbuda)* (2003), WTO Doc. WT/DS285/Add.1. Of these only *EU – Bananas*, *Canada – Periodicals*, *Canada – Autopact* and *Mexico – Telecommunications* (subject to appeal) have resulted in final decisions. Above WTO documents are available online at the WTO: *Disputes, chronologically*:

(h) Summary of Canada's GATS Obligations

With respect to services subject to the GATS, the Agreement creates both a general framework of obligations that apply to all services and a customized set of specific commitments regarding the treatment of particular services that Canada agreed to list in its national schedule of commitments. The most important general rule is the obligation to grant MFN treatment to services and service suppliers of WTO Members. For every service that is listed in its national schedule, Canada has committed to a higher level of obligation. For these services only, Canada must grant foreign services and service suppliers of other WTO Members national treatment and cannot impose certain restrictions on market access. The national treatment and market access obligations for listed services are circumscribed by specific limitations inscribed by Canada in its schedule. For listed services, Canada's regulatory regime also has to meet specified standards, including a requirement that measures affecting trade in services be administered in a reasonable, objective and impartial manner.

Canada remains free to modify the specific commitments it has made in its national schedule but may have to provide a compensatory adjustment in the form of trade concessions to Members whose benefits under the GATS are affected by such a modification. Any such concession must be extended to all WTO Members in accordance with the MFN obligation.

Canada's GATS obligations extend to subsidies, subject to the limitations it has included in its national schedule as described in Sections 3 and 7 of this study. All of Canada's obligations are also subject to certain general exceptions that might be available in relation to measures related to the regulation and delivery of health services in limited circumstances. Finally, Canada's obligations under the GATS are subject to the WTO's dispute settlement procedures under the DSU.

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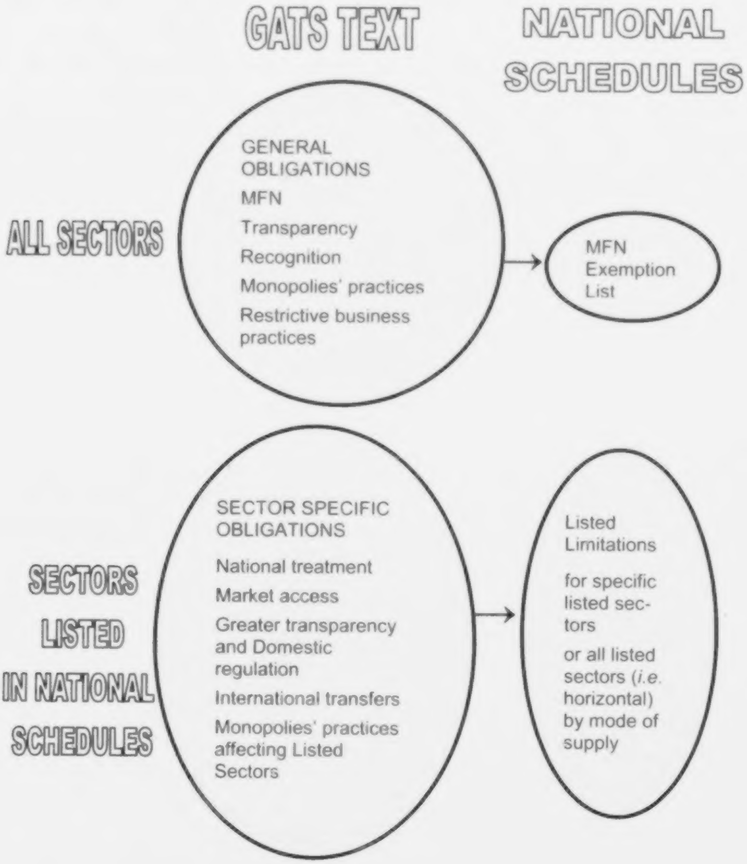
http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm, accessed September 16, 2004.

Architecture of the General Agreement on Trade in Services


GATS TEXT
NATIONAL SCHEDULES
ALL SECTORS
GENERAL OBLIGATIONS
MFN
Transparency
Recognition
Monopolies' practices
Restrictive business practices
MFN Exemption List
SECTORS LISTED IN NATIONAL SCHEDULES
SECTOR SPECIFIC OBLIGATIONS
National treatment
Market access
Greater transparency and Domestic regulation
International transfers
Monopolies' practices affecting Listed Sectors
Listed Limitations
for specific listed sectors
or all listed sectors (*i.e.* horizontal) by mode of supply

Subject to

- exclusion of "services supplied in the exercise of governmental authority"
- exclusion of government procurement
- general exceptions
- right to modify national schedule
- Annexes (including Movement of Natural Persons, Air Transportation, Financial Services, Telecommunications)

3. Canada's Sector Specific Commitments That May Affect Health, Education and Social Services

(a) Introduction

As noted earlier, Canada has undertaken no obligations regarding market access, national treatment or other sector-specific GATS provisions in respect of health, education and social services. Further, the Government of Canada relies on the governmental authority exclusion to support its contention that public delivery of such services is not subject to general GATS disciplines (such as MFN and transparency) in any way. Canada has, however, made commitments in some other sectors that might affect the conditions in which service suppliers in the health, education and social services sectors operate, even though these commitments were not targeted at health, education or social services.

(b) Canada's Specific Commitments in Sectors Other Than Health, Education and Social Services

Canada has made commitments in relation to services that may be purchased by, for example, schools, universities, hospitals and social services agencies, including: accounting, auditing and bookkeeping; architecture and engineering; computer consulting and maintenance and data processing; security services; and building maintenance.[71]

As discussed in Section 7, if the effect of these commitments is to provide greater access for suppliers of such services to the Canadian market, they may help to increase the efficiency of health, education and social services providers. To the extent that foreign competition in the supply of these other services results in lower costs to our schools, universities, hospitals and social services agencies the efficiency of their operations will be improved.[72] As discussed below, the delivery of core health, education and social services should not be affected by these commitments in any other way.

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[71] Canada, *Schedule of Specific Commitments* (15 April 1994), WTO Doc. GATS/SC/16 and Supp. 1, 2, 3, and 4 [*Canada's Services Schedule*]. Sanger also suggests that food services purchased by hospitals, schools and universities and other public services providers could be the subject of a specific commitment based on Canada's listing of "hotels and restaurants (including catering)" under "tourism and travel-related services" because of the definitions in the associated Provisional CPC classification, above note 38) (Sanger, above note 5, at 91). This suggestion is discussed below at notes 409-413 and accompanying text.

Canada's commitments in two sectors may have some impact on measures related to the supply of services in those sectors by universities and other Canadian education service suppliers. Canada has listed "research and experimental development services on social sciences and humanities, including law and economics, except linguistics and language" in its national schedule of commitments. As well, Canada has listed computer services. No limitations were placed on these commitments, except for those relating to research and development described in the next section.[73] The possible impact of these commitments is analyzed in Section 7 of this study.

Finally, Canada has listed health insurance in its national schedule, reflecting the fact that domestic and foreign private sector insurance companies are permitted to provide insurance for certain health services.[74] Canada has committed to granting market access and national treatment subject to a number of limitations. The most important of these is that foreign insurers can only supply services in Canada through a commercial presence. Some have expressed concerns that Canada's commitments in respect of insurance may extend to provincial health plans and other publicly funded schemes.[75] As discussed below in Section 6 of this study, there is little foundation for these concerns. Canada's commitments could, however, have an impact on possible future initiatives to extend public health funding to cover services currently insured by private firms.[76] This issue is taken up in Section 7 of this study.

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[72] Most of these services are contracted out by hospitals and there is some evidence that cost savings result from doing so. See Romanow Report, above note 5, at 6.

[73] As discussed below, Canada did record a horizontal limitation relating to research subsidies. See below, notes 430-431 and accompanying text.

[74] The full text of Canada's specific commitment in relation to health insurance is set out in Appendix III to this study. Canada listed "Life, Health and Accident Insurance Services" and referenced the Provisional CPC (above note 38) code 8121. This code does not, in fact, include health insurance services, though the WTO Secretariat's Classification List (W/120, above note 38) identifies life, health and accident insurance using this number. There can be no doubt that Canada has listed health and accident insurance, however. Not only could a Member rely on the express words used, but also Canada listed "Non-Life Insurance" and referenced Provisional CPC code 8129, which includes health and accident insurance.

(c) Horizontal Limitations

Canada has included several "horizontal" limitations in its schedule of commitments that circumscribe Canada's obligations in ways relevant to health, education and social services. These limitations are "horizontal" in the sense that they limit Canada's obligations in all sectors listed in its national schedule.

First, Canada has retained its freedom to discriminate against foreign service suppliers operating in Canada through modes 3 or 4 (commercial presence or temporary entry) in all listed sectors in terms of the prices charged to them for certain public services, namely public education, training, health and child care and the benefits provided under income security or insurance, social security or insurance and social welfare programs. Such discrimination by Canada against service suppliers of other WTO Members as compared to the treatment of Canadian businesses supplying like services thus cannot be held to be a breach of Canada's national treatment obligation.[77]

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[75] *E.g.*, Sanger, above note 5, at 76-87.

[76] See below notes 417-425 and accompanying text.

[77] The limitation is set out in Appendix III to this study. The full text of the limitation itself is as follows: "Measures related to the supply of services required to be offered to the public generally in the following sub-sectors may result in differential treatment in terms of benefits: income security or insurance, social security or insurance and social welfare or price: public education, training, health and child care." In discussions relating to the scope of the GATS prior to the conclusion of the Uruguay Round in 1993, questions were raised regarding whether GATS obligations would extend to the provision of social security benefits. The view of the GATT Secretariat

Second, Canada's schedule contains two horizontal limitations relating to research. One limitation preserves Canada's flexibility to provide subsidies for research and development in ways that discriminate against foreign service suppliers operating in Canada through a commercial presence. Another allows Canada to maintain or put in place tax preferences relating to the treatment of research and development expenses that are only available to domestic and foreign suppliers operating within Canada. The possible significance of these limitations in relation to research activities of universities is discussed in Section 7 of this study.[78]

Finally, Canadian governments may supply, or subsidize services "within the public sector." While the scope of this horizontal limitation on Canada's national treatment obligation is somewhat unclear, at the very least, it confirms Canada's flexibility to deny access to publicly provided or subsidized services to foreign service suppliers. Again, the relevance of this limitation to health services is discussed in Section 7 of this study.[79] The important question is whether this limitation can be interpreted to allow Canada to extend public funding to new areas of health services, like home care, if the effect is to displace foreign private insurers whose business includes providing insurance for such services.

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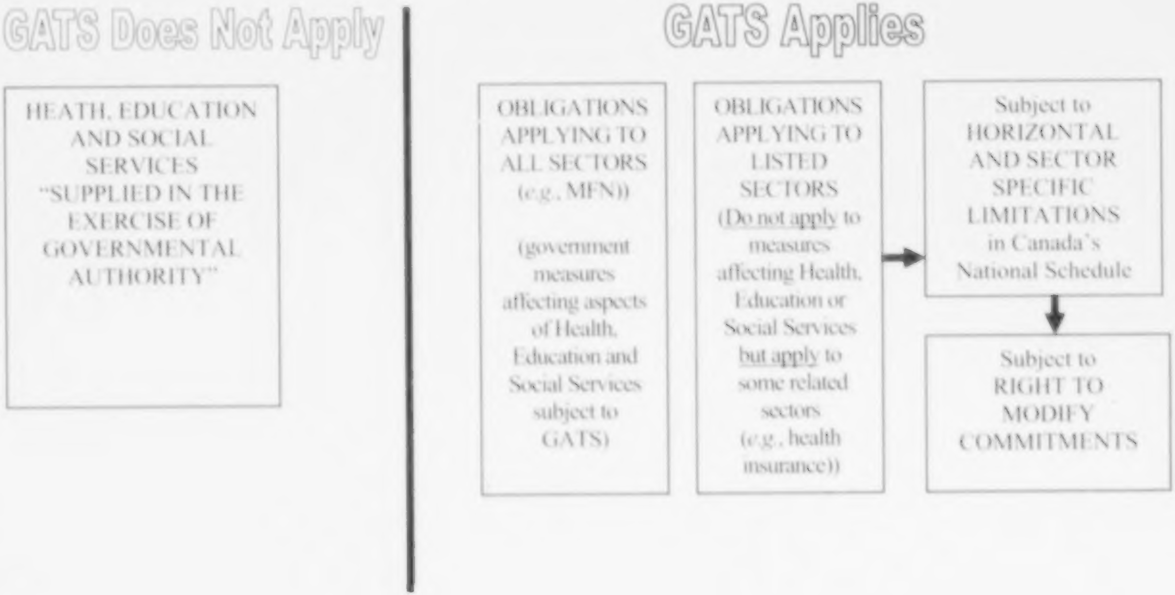
was that they would not apply to the supply of such benefits but that access to and use of social security benefits would be covered. See GATT Secretariat, *Issues Relating to the Scope of the General Agreement on Trade in Services* (4 November 1993), GATT Doc.MTN.GNS/W/177/Rev.1; and T.P. Stewart, ed. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) [*Uruguay Round Negotiating History*], vol. 4, at 801-803. Canada's limitation does not apply to services supplied in modes 1 or 2.

[78] See below notes 429-431 and accompanying text. The full text of these horizontal limitations is set out in Appendix III to this study.

[79] See below note 424 and accompanying text. The full text of these horizontal limitations is set out in Appendix III to this study.

Tiers of Canada's GATS Obligations Related to Health, Education and Social Services



GATS Does Not Apply

HEATH, EDUCATION AND SOCIAL SERVICES "SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY"

GATS Applies

OBLIGATIONS APPLYING TO ALL SECTORS (e.g., MFN))

(government measures affecting aspects of Health, Education and Social Services subject to GATS)

OBLIGATIONS APPLYING TO LISTED SECTORS (Do not apply to measures affecting Health, Education or Social Services but apply to some related sectors (e.g., health insurance))

Subject to HORIZONTAL AND SECTOR SPECIFIC LIMITATIONS in Canada's National Schedule

Subject to RIGHT TO MODIFY COMMITMENTS

4. Health, Education and Social Services in Canada

(a) Health

Introduction

Health care services in Canada consist of diverse activities delivered and funded in a wide variety of ways involving public, private,[80] for-profit and not-for-profit organizations of different types. Although the federal government provides significant funding, health care is largely a provincial and territorial responsibility.[81] As a result, the extent to which health care receives government funding and the methods of services delivery vary considerably from one jurisdiction to the next. Delivery of health care services is largely by private entities; however, unlike other sectors, many health services suppliers operate on a not-for-profit basis and are subject to intensive government control over the manner in which their services are delivered. Both health care funding and delivery are evolving. Changes in technology and medical science, as well as initiatives to deliver increasingly expensive health services more effectively and at lower cost, are the major factors driving this evolution. Demographic changes are also playing a catalytic role in this regard.

The diversity and continually evolving nature of health services render it difficult to make reliable generalizations regarding the extent to which health services are subject to the GATS and the impact of GATS obligations on health services regulation and delivery. This study cannot capture the Canadian health care system in all its aspects. Nevertheless, it is possible to identify the fundamental attributes of the system so as to permit the impact of the GATS to be discussed in general terms.

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[80] For the purposes of this study "private" includes all services suppliers that are not institutionally part of the state. Private in this sense includes individuals, corporations and other forms of business organization the ownership interests of which are held by other private persons as well as not-for-profit corporations that have members instead of shareholders. As discussed below, some such private suppliers, like hospitals, may be substantially funded by and under the control of the state.

[81] The actual division of powers is quite complex. The federal government has responsibility for health care in certain areas, such as health services for aboriginals, veterans, members of the Royal Canadian Mounted Police and inmates in federal prisons. See generally M. Jackman, "Constitutional Jurisdiction over Health in Canada" (2000) 8 Health L. J. 95; C. M. Flood, "The Anatomy of Medicare," in *CANADIAN HEALTH LAW AND POLICY*, J. Downie, T. Caulfield & C.M. Flood (eds) (Toronto: Butterworths, 2002)[*Flood*], at 11-16. A good discussion of the health care services to aboriginal peoples is provided in Romanow Report, above note 5, at 212-218.

What are Health Services?

In order to speak meaningfully about the application of the GATS to health services, the first challenge is to define what we mean by health services. In general, we may think of health care as including services that are "medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability." This definition, drawn from the *Canada Health Act*,[82] would include the services of medical practitioners, including general and specialist physicians and dental surgeons, as well as a range of services provided by hospitals including the following:

- accommodation and meals, if medically required;
- nursing;
- laboratory, radiological and other diagnostic services;
- drug administration; and
- use of operating rooms, case rooms, aesthetic facilities, medical and surgical equipment, radiotherapy and physiotherapy, and administrative services.

Independent professionals operating on their own or in firms may provide some of these services, such as laboratory, radiological, diagnostic and therapeutic services, out of hospital. In some cases, these services may be medically necessary as well.

A broad spectrum of other services may be considered to be health services even though they may or may not be considered medically necessary. Routine dental, vision, physiotherapy, chiropractic, podiatry and similar services may not be considered medically necessary, even though they help to maintain health. Similarly, other services, such as the services of nursing homes and homes for the aged, home care, and rehabilitation care, may not be considered medically necessary either, though they clearly play a role in supporting health and typically involve both health care professionals as well as others providing support services. Services that complement, or are alternatives to, the services described above, such as traditional aboriginal medicine, oriental medicine, homeopathy and naturopathy support health maintenance but may be found to fall outside what is considered medically necessary. Nevertheless, all these services are treated as health services for the purposes of this study.[83]

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[82] R.S.C. 1985, c. C-6 [*CHA*], s. 2 "hospital services".

Public health and health promotion, the education and training of health professionals and the planning, research and management of health care facilities may be considered elements of the health care system. Nevertheless, since they are not integral to the actual delivery of health care to a patient, these services are not considered to be health services for the purposes of this study.[84]

The GATS itself contains no definition of health services or any other service. Most WTO Members scheduled their specific commitments for particular services using the Services Sectoral Classification List developed during the Uruguay Round of multilateral trade negotiations.[85] In the Classification List, "Health Related and Social Services" is a distinct category of activity, but it does not include all of the services identified above.[86] The services of health professionals, for example, are listed under Business Services.[87] Some services not mentioned above, but related to the delivery of health services are classified under other categories in national schedules of commitments. Health insurance, for example, is categorized as a financial service. As noted above, various types of support services that are inputs in the delivery of health services, such as building maintenance services, are classified separately.

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[83] R.B. Deber identifies the elements of the health care system as including: acute hospital care, chronic hospital care, ambulatory outpatient care (including physician's services), laboratories and radiology, ancillary benefits (*e.g.*, dental, vision, physiotherapy, chiropractics and podiatry), ambulance and transportation, nursing homes and homes for the aged, home care, rehabilitation care, drugs, assistive devices, mental health, and public health/health promotion, education and training of health professionals and planning, research and management (R.B. Deber "Delivering Health Care Services: Public, Not-for-Profit, or Private" Discussion Paper No. 17, Commission on the Future of Health Care in Canada (2002)[*Deber*] at 8). See also Sanger, above note 5, at 28-29 and Vellinga, above note 10, at 143-144. The much less precise characterization of the sector in the WTO Secretariat's W/120, above note 38, used by most WTO Members to make their GATS commitments, is set out in Appendix 2 to this study.

[84] These services would nevertheless be services subject to the GATS unless they were services supplied in the exercise of governmental authority, as is likely the case with most public health and health promotion services which are delivered directly by the state.

[85] W/120, above note 38.

Health care services may be traded in any of the four modes of supply under the GATS. Increasingly, Canadian patients are obtaining health services on a cross-border basis (mode 1) from foreign professionals through various "tele-health" applications, such as remote diagnosis provided by a physician outside the country.[88] Health care is also being provided by foreign health care professionals to Canadian patients travelling abroad (mode 2). Currently, there are no foreign hospitals operating facilities in Canada, but if foreign hospitals were permitted to operate in Canada, their activities would constitute the supply of health services through a commercial presence (mode 3). Foreign doctors providing services to Canadian patients while temporarily in Canada would be a supply of health services through a temporary[89] presence of natural persons (mode 4).

Health Services Funding

Basic Health Services – Insured Services under the *Canada Health Act*

Under the *Canada Health Act*, the federal government provides substantial funding for provincial and territorial health care plans, but it is the provinces and territories that are responsible ultimately for the administration and delivery of health services to individuals. The federal government provides funding for health care as part of the Canada Health and Social Transfer,[90] a block grant provided to each province and territory to support its role in health, social assistance, post-secondary education and certain other programs. Each province and territory decides how to allocate the funds between health services and its other priorities.[91]

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[86] Sanger (above note 5, at 58-64) provides a comprehensive listing of services related to health care and their classification under the Provisional CPC, above note 38.

[87] In GATS schedules, medical and dental services, and services provided by midwives, nurses and other paramedical professionals corresponding to Provisional CPC, *ibid.*, codes 9313 and 99191 are listed under Business Services.

[88] Tele-health and some of the specific implications are discussed below (see notes 399-403 and accompanying text).

[89] As noted above, temporary is not defined in GATS. See above note 28 and accompanying text.

A fundamental objective of the *Canada Health Act* is to ensure that individuals have reasonable access to medical services insured under the *Act*. Insured services are defined as:

- medically necessary hospital services;
- medically required physician services; and
- surgical-dental services required to be performed at a hospital.[92]

The *Act* establishes the criteria that provinces and territories must satisfy in order to receive full funding through the Canada Health and Social Transfer. The five criteria are public administration, comprehensiveness, universality, portability and accessibility. Their imposition through the *Canada Health Act* fundamentally shapes the delivery of basic health care in Canada.

Public Administration – Each province and territory must establish a health plan administered on a non-profit basis by a public authority appointed or designated by the provincial or territorial government.[93] In effect, this establishes a monopoly in each province and territory to pay for all funded health services delivered within the jurisdiction.[94] The plan is responsible for decision making on benefit levels and services.[95] In all provinces and territories, other than Alberta, British Columbia and Ontario, financing for health care is provided exclusively from provincial and territorial revenues, supported by the Canada Health and Social Transfer. In Alberta, British Columbia and Ontario, funding from general revenues and federal transfers is supplemented by premiums charged to individuals, though these premiums are not based on risk and prior payment is not a condition of getting treatment.

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[90] *Budget Implementation Act, 1995*, S.C. 1995, c. 17, as amended by *Federal-Provincial Fiscal Arrangements Act*, S.C. 1996, c. 11, ss. 46.1 and 53. Transfers to the territories occur somewhat differently.

[91] Romanow Report, above note 5, at 37. It is estimated by Finance Canada that approximately 62% of the Canada Health and Social Transfer goes to health care (Health Canada, *Canada Health Act: Overview*, (Ottawa: Health Canada, 2003, Health Canada online: <www.hc-sc.gc.ca/medicare/chaover.htm> (date accessed November 7, 2003) [*Health Canada Overview*].

[92] *CHA*, above note 82, s. 2. Some funding is available for "extended health services" in accordance with s. 13 of the *CHA*. These are defined as nursing home intermediate care, adult residential care, home care, and ambulatory health care services.

[93] *CHA*, *ibid.*, s. 8. Nothing in the *CHA* prevents a provincial government from contracting with a private business to operate its plan. Currently no province does so. See Flood, above note 81, at 19.

Comprehensiveness – The health plan in each province and territory must fund all health services defined as insured services under the *Canada Health Act*.[96] Nevertheless, the use of the terms "medically necessary" and "medically required" in the definitions of insured services gives provinces and territories a certain amount of latitude with respect to deciding which services they fund. Consequently, insured health services are not uniform across the country. Certain optometry services are covered in Ontario, for example, but not elsewhere. In the interests of cost cutting and other policy considerations, some provinces have used this latitude to remove funding from, or "de-list," certain kinds of services in recent years.[97]

All Canadian jurisdictions permit physicians to opt out of the public system but several factors have precluded the development of a second-tier private market for health services insured under the *Canada Health Act*. In Manitoba, Nova Scotia and Ontario, physicians who opt out cannot charge patients more than they could charge to the provincial or territorial plan. In other jurisdictions, prices are not fixed. In all provinces and territories, however, patients who use the services of opted-out physicians must pay the full price of such services out of their own pocket. No charge may be made to the provincial or territorial plan. As well, in most Canadian jurisdictions, private insurers are prohibited from insuring services insured under the *Canada Health Act*.[98] Only Nova Scotia, Newfoundland, New Brunswick and Saskatchewan appear to have no such legislation.[99] Nevertheless, the combination of price caps, restrictions on private insurance and the loss of provincial funding have practically precluded the development of a significant private market for basic health services.[100]

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[94] This is the so-called "single payer" system.

[95] Health Canada Overview, above note 91, at 3. The records of each provincial and territorial plan are publicly audited.

[96] *CHA*, above note 82, s. 9.

[97] Some of these actions have been the subject of legal challenges under the *Charter of Rights and Fundamental Freedoms*. See Flood, above note 81, at 24-26. Many commentators also refer to "passive privatization" meaning that the manner in which certain medical problems are treated increasingly falls outside those treatments that are publicly funded. This occurs, for example, when publicly funded hospital care is replaced by privately funded drug treatment. *E.g.*, T. Epps & C. Flood, "Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the NAFTA for Medicare" (2002) 47 McGill L. J. 747.

Universality – Provincial and territorial health plans must entitle one hundred percent of the insured persons in the province or territory to the insured health services provided by the plan on uniform terms and conditions.[101] Essentially, insured persons are defined as residents of the province or territory.[102]

Portability – Provincial and territorial health plans cannot impose any minimum period of residence or waiting period in excess of three months before residents are entitled to coverage for insured services and must provide coverage to residents for treatment received when they are temporarily absent from the province or territory.[103] For services rendered to residents who are outside the country, plans must reimburse the amount that would have been paid had the service been rendered in Canada. Currently, five provinces do not comply with this requirement.[104] While the federal government has discretion to withhold funds where there has been non-compliance with this or any of the other *Canada Health Act* criteria, it has never exercised this discretion.[105]

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[98] *E.g.*, *Alberta Health Care Insurance* Act, R.S.A. 2000, c. A-20, s. 26; and Ontario *Health Insurance* Act, R.S.O. 1990, c. H.6, s. 14. A challenge to the constitutionality of Quebec's prohibition on private health insurance for services covered by its health plan was heard by the Supreme Court of Canada on June 8, 2004 (*Chaoulli* v. *Québec* (Procureur-Général), [2002] R. J. Q. 1205 (C.A.), leave to appeal to S.C.C. granted).

[99] C.M. Flood & T. Archibald, "The Illegality of Private Health Care in Canada," (2001) 164 Can. Med. Assoc. J. 825.

[100] *Ibid.* In the aggregate, public sector funding represented about 72.7% of total health expenditures in 2001 (*Health Care in Canada 2002* (Ottawa: CIHI, 2002)[*Health Care in Canada 2002*], at 29, online: CIHI <www.cihi.ca> (date accessed May 15, 2003)).

[101] *CHA*, above note 82, s. 9.

[102] *CHA*, *ibid.*, s. 2, "insured person".

[103] *CHA*, *ibid.*, s. 11.

Accessibility – Services provided under provincial and territorial plans must be available on uniform terms and conditions. Payment for services must be in accordance with an approved tariff set under a plan or through some other system providing reasonable compensation to medical practitioners. User fees and extra-billing for *Canada Health Act* insured services are specifically prohibited.[106] Fees charged or billing in excess of the tariff set in a province or territory result in a mandatory dollar for dollar reduction in federal transfers to that province or territory.[107]

Supplementary Health Services

Most services not insured under the *Canada Health Act*, including semi-private rooms for hospital stays, and most dentistry, vision care and psychology services, must be paid for privately, either directly out-of-pocket or through private insurance plans paid for by individuals or their employers. Private insurers decide whether to offer such insurance and at what rate based on their assessment of the risk profile of the insured. They are not subject to any requirement to ensure access to health services. For Canadian income tax purposes, employers can deduct the amounts they pay for private insurance for their employees. Individuals may be able to deduct insurance premiums that they pay personally[108] and may receive a tax credit for medical expenses paid for out-of-pocket.[109]

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[104] Flood, above note 81, at 20-21.

[105] *CHA*, above note 82, s. 15. See Flood, *ibid.*, at 30.

[106] *CHA*, *ibid.*, ss. 12, 18, & 19.

[107] *CHA*, *ibid.*, ss. 14, 15, & 20. Between 1995 and 2001, approximately $6 million was withheld from four provinces in which patients were extra-billed for insured services (Flood, above note 81, at 30).

[108] Flood, *ibid.*, at 33.

[109] *Income Tax Act*, R.S.C. 1985, 5th Supp., c. 1, ss. 118(6), 118.2 and 118.4.

More than 75% of Canadians have some private insurance to cover the costs of some of the services not insured under the *Canada Health Act*.[110] Private health insurers pay for about 10% of total expenditures on health.[111] In 2001, 39.3% of private expenditures were paid by insurers.[112]

Estimates regarding the share of the private insurance market held by foreign insurers vary between 10 and 30%.[113] Of 110 firms operating in Canada in 2002, 66 were incorporated in Canada, 35 in the United States and 9 in the European Union.[114]

Some services that are not defined as insured services under the *Canada Health Act* are covered by provincial programs to some extent in some provinces. Eligibility for financial support under many of these programs is restricted to particular groups such as seniors, the disabled and welfare recipients. Under most provincial programs, the recipient is charged a co-payment.

All provinces publicly fund some home care and long-term residential care programs, which provide professional health services, personal care and other home support services, including food and cleaning services. Most home care and long-term residential care is not insured under the *Canada Health Act*. Provincially funded home-care programs are targeted at specific disadvantaged groups or people who, due to their medical condition, cannot go to a hospital or other medical facility to receive treatment. All nursing home services in many provinces are substantially funded by the state, though residents must make a co-payment as well. There are significant variations in eligibility criteria, services provided and the incidence and magnitude of user fees from one jurisdiction to the next with respect to home-care and long-term residential care programs.[115] Outside these provincial programs, home care and some forms of long-term residential care are funded exclusively from private funds.

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[110] Flood, above note 81, at 33.

[111] Canadian Life and Health Insurance Information Association, *Canadian Life and Health Insurance Facts – 2001 Edition* (Ottawa: CLHIA 2001), cited in Canadian Centre for Policy Alternatives Consortium on Globalization and Health, *Summary Report: Putting Health First: Canadian Health Care Reform, Trade Treaties and Foreign Policy for the Commission on the Future of Health Care in Canada* (2002)[hereinafter *CCPA Report on Health*], at 23.

[112] World Health Organization, "Core Health Indicators: Canada," WHO http://www3.who.int/whosis/country/indicators.cfm (accessed: July 27, 2004).

[113] *CCPA Report on Health*, above note 111, at 23-24.

[114] Canadian Life and Health Insurance Information Association, *Canadian Life and Health Insurance Facts – 2003 Edition* (Ottawa: CLHIA 2003). According to the CLHIA, approximately 18% of premiums for private health insurance were paid to foreign incorporated firms in the same year. The market share of Canadian firms has been increasing over the past decade.

In some provinces, private insurers are prohibited from offering coverage of supplementary health services covered under government programs. In the others they are practically excluded from the market by the availability of government funded programs. Otherwise private firms compete with each other in the market for insuring supplementary health services.[116]

Health Care Delivery

Introduction

As noted at the outset, health care services are delivered in a variety of ways involving many different types of professionals operating in public and private for-profit and not-for-profit organizations of different types. Delivery is subject to a wide assortment of government regulation, ranging from no regulation at all, which is the case for midwives in at least four provinces,[117] to control over the budget, location, services and management, as is the case with most hospitals in accordance with specific legislation.[118]

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[115] Flood, above note 81, at 32; Romanow Report, above note 5, at 173-4. About 80% of expenditures on home care are from public sources (*CCPA Report on Health*, above note 111, at 29).

[116] Flood, *ibid.*, at 33. Blue Cross operates health insurance plans on a not-for-profit basis for residents of each province and territory, online: Blue Cross <www.bluecross.ca> (accessed November 17, 2003). Private insurance for home care is discussed extensively in C. Fuller, *Home Care: What we have, What we need* (Canadian Health Coalition, 2001)[*Fuller*], at 6-7.

[117] *Canadian Health Care Workers* (Ottawa: CIHI, 2002), www.cihi.ca (accessed May 16, 2003)[*Canadian Health Care Workers*], at 23.

[118] *E.g.*, *Public Hospitals Act*, R.S.O. 1990, c. P.40 [*Ontario Public Hos-*

Hospitals

In Canada, few hospitals are operated directly by the state, though the federal government operates some hospitals serving native communities.[119] Some hospitals are operated directly by provincial health authorities and 5% of hospital services are provided in private for-profit clinics.[120] Most hospitals, however, operate as private not-for-profit corporations, incorporated under provincial or territorial legislation. Their letters patent or articles of incorporation set out their objectives. Under framework legislation in each province and territory,[121] the government is extensively involved in their operation.[122] Hospital executives often refer to this practice pejoratively as "micro-management." Hospitals must be licensed to operate and may be ordered by the responsible Minister to offer or to cease offering specific services or even to cease operations altogether. Typically, the Minister must authorize any change to their operations or facilities. Most hospitals operate on the basis of case-mix-adjusted global budgets allocated by the province or territory which attempt to adjust for the additional costs incurred by hospitals that treat more severely ill patients. In most cases, budgets for hospitals are within the Minister's discretion and are the outcome of negotiations be-

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pitals Act]; *Hospitals Act*, R.S.N.S. 1989, c. 208 [*Nova Scotia Hospitals Act*]; and *Hospital Act*, R.S.B.C. 1996, c. 200 [*British Columbia Hospital Act*].

[119] Responsibility for many of these facilities is in the process of being transferred to aboriginal groups (Sanger, above note 5, at 29).

[120] *Canada's Health System at a Glance* (November 28, 2002), online: Health Canada <www.hc-sc.gc.ca> (date accessed January 15, 2003). The Romanow Report, above note 5, cites research indicating that there are over 300 private for-profit clinics in Canada providing diagnostic and therapeutic services also provided in hospitals (at 6). The report also indicates that, increasingly, provincial health plans are contracting with such clinics for hospital services in an effort to realize efficiencies (at 6, 8). See also Chapter 3 of the Kirby Report, above note 6, at 127.

[121] *E.g.*, Ontario *Public Hospitals Act*, above note 118; Nova Scotia *Hospitals Act*, above note 118; and British Columbia *Hospital Act*, above note 118.

[122] Flood, above note 81, asserts that provincial governments are so heavily involved in Canadian hospitals that they "look and act like government owned hospitals" (at 40).

tween the province and individual hospitals or regional health authorities. Hospitals subject to this kind of extensive government control are often referred to as "public" hospitals. In some provinces, such "public" hospitals must raise some funds for capital expenditures from their communities.[123]

Traditionally, volunteer boards of directors have run hospitals with community and, sometimes, staff representatives. Recently, in all provinces but Ontario, many of the administrative responsibilities of hospitals have been transferred to regional health authorities that administer a number of hospitals.[124] In some cases, hospital boards have been dissolved. At the same time, power to manage the health care system has been devolved by provincial ministries of health to the regional health authorities, resulting in an integration of funding and delivery roles.[125] Most regional health authorities are appointed by government, though there have been recent initiatives in some provinces to allow some board members to be elected by the public.[126]

Physicians

Most services insured under the *Canada Health Act*, including the vast majority of primary care services, are provided by physicians who are private practitioners. Approximately one quarter of general practitioners work alone. Most others work in practice groups or clinics owned and managed by physicians. Fewer than 10% work in multidisciplinary practices.[127] With respect to most services under the *Canada Health Act*, physicians are compensated by governments on a fee-for-service basis at rates set under provincial or territorial plans. All jurisdictions now impose caps on billings by individual physicians.[128] Some physicians work as salaried employees or receive other forms of compensation. In 1999-2000, 20% of physicians received some payments other than on a fee-for-service basis.[129]

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[123] Deber, above note 83, at 30. British Columbia and New Brunswick use line-by-line budgeting (Kirby, above note 7, at 27-33).

[124] *E.g.*, Alberta's *Regional Health Authorities Act*, R.S.A. 2000, c. R-10, s. 2.

[125] The expanding role of regional health authorities is discussed in the Kirby Report, above note 6.

[126] For a discussion of the particular rules dealing with the mental health system, see H.A. Kaiser, "Mental Disability Law" in *Canadian Health Law and Policy*, J. Downie, T. Caulfield & C.M. Flood (eds) (Toronto: Butterworths, 2002), at 251; and J. E. Gray, M. A. Shone & P. F. Liddle, *Canadian Mental Health Law and Policy* (Toronto: Butterworths, 2000).

[127] *Canadian Health Care Workers*, above note 117, at 61. These figures are for 2001.

Some provinces have attempted to put in place some restrictions on the number and location of physicians in the interests of controlling costs and ensuring that individuals in all parts of a province have access to a physician.[130] For services not insured under the *Canada Health Act*, physicians bill patients directly, unless the patient is eligible under some provincial or territorial funding program. Overall, 98.6% of payments to physicians in 2000 came from the state.[131]

Physicians have a significant amount of discretion (usually referred to as "clinical autonomy") to determine what services to supply, to whom and when. Competency standards for physician services are established and enforced by self-regulating organizations in each province and territory.[132]

Other Health Care Professionals

Most health care professionals, other than physicians, do not perform diagnostic services, prescribe treatment or receive payment from a provincial or territorial health plan. Some health professionals work as employees in hospitals or private businesses operating on either a for-profit or not-for-profit basis. For example, most nurses are salaried employees and approximately 64% work in hospitals.[133] Many other health care professionals are self-employed. In most cases, patients must pay for the services of these health care professionals directly, unless they are provided in a hospital.

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[128] Flood, above note 81, at 33, 36-7; Kirby, above note 6, at 77.

[129] *Canadian Health Care Workers*, above note 117, at 74. The proportion of physicians receiving payments other than on a fee-for-service basis varies from 2% in Alberta to 40% in Manitoba (Health Care in Canada 2002, above note 100, at 33). Other forms of payment to physicians for primary care include salaries, hourly or sessional payments and capitation for physicians working in practice groups.

[130] Provincial attempts to regulate the distribution of physicians and the legal challenges to them are discussed in L. McNamara, E. Nelson and B. Windwick, "Regulation of Health Care Professionals" [*McNamara*] in *CANADIAN HEALTH LAW AND POLICY*, J. Downie, T. Caulfield & C.M. Flood (eds) (Toronto: Butterworths, 2002), at 80-84 and Flood, above note 81, at 38.

[131] *Canadian Health Care Workers*, above note 117, at 73.

[132] *Canadian Health Care Workers*, *ibid.*, at 23-26.

Most health care professionals are subject to regulation in various forms. More than 30 categories of health care professionals are regulated in at least one province. Nurses are regulated in every province and territory. Some health care professionals are not regulated at all or are only regulated in some provinces. Massage therapists, for example, are only regulated in British Columbia.[134] In terms of the form of regulation, some professionals, such as physicians and dentists, must have licenses to practice. A license typically gives the professional an exclusive right to perform a specific set of services.[135] Obtaining and keeping a license depends on the professional meeting certain ethical and professional standards. Other professionals require only a certificate as a condition of being allowed to use a particular title. These certificates can be obtained only if an individual meets certain requirements. For example, in some provinces physiotherapists, dental hygienists and dieticians require a certificate to use their professional titles. Provincial and territorial requirements with respect to which professionals require licenses and certificates and what standards must be met vary significantly.

The regulation of many health professionals is the responsibility of self-regulating organizations operating under provincial or territorial legislation.[136] These bodies prescribe minimum requirements for skills, knowledge and educational attainments as well as practice and ethical standards. Typically, they provide a process for dealing with complaints from the public regarding members of their profession, and have the power to impose disciplinary sanctions.[137]

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[133] Flood, above note 81, at 39.

[134] *Canadian Health Care Workers*, above note 117, at 23.

[135] It is possible that other professionals will be permitted to provide services that overlap.

[136] McNamara, above note 130, at 60-80. *E.g.*, *Health Professions Act*, R.S.B.C. 1996, c. 183.

Nursing Homes and Homes for the Aged

Nursing homes and homes for the aged offer a mix of services, including health services supplied by health professionals and support services such as meals and cleaning services. Most nursing homes are operated by large for-profit firms and are subject to a comprehensive licensing regime.[138] Under the regime, licences may be denied if the responsible provincial or territorial minister determines that the demand for nursing home services is not sufficient in the area in which the prospective licensee proposes to operate. The responsible provincial or territorial ministry typically sets standards for competence, admission, care, services and facilities and prescribes the rights of residents of nursing homes.[139] Local legislation may also set maximum rates that may be charged to residents.[140]

For-profit private businesses, non-profit corporations and municipalities all operate homes for the aged where nursing care is not provided. Old age homes are subject to licensing requirements in some, but not all, provinces.[141] Many other programs providing varying degrees of residential care, including services to support seniors in independent housing are operated by the provinces and territories. Medically necessary services provided by physicians in nursing homes and old age homes are paid for by the state under the *Canada Health Act*.

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[137] *Canadian Health Care Workers*, above note 117, at 25.

[138] *E.g.*, *Nursing Homes Act*, R.S.O. 1990, c. N.7 [*Ontario Nursing Homes Act*]; British Columbia *Hospitals Act*, above note 118; *Nursing Homes Act*, R.S.A. 2000, c. N.7 [*Alberta Nursing Homes Act*]; *Homes for Special Care Act*, R.S.N.S. 1989, c. 203. Under the Ontario *Nursing Homes Act*, the Minister of Health must announce the desired balance between for-profit and not-for profit providers of nursing home services annually in the Ontario legislature (s. 5(6)).

[139] *E.g.*, Ontario *Nursing Homes Act*, *ibid.*, s. 2. Alberta *Nursing Homes Act*, *ibid.*, s. 12, and *Nursing Homes General Regulation*, AR 232/85.

[140] *E.g.*, Ontario *Nursing Homes Act*, *ibid.*, s. 21. Alberta *Nursing Homes Act*, *ibid.*, s. 8(2).

[141] Old age homes are highly regulated in British Columbia (see *Community Care Facility Act*, R.S.B.C. 1996, c. 60 and *Adult Care Regulations*, B.C. Reg. 536/80). Licences are not required in some other provinces. In Ontario, municipalities are obliged to establish old age homes. There is no licensing regime, but old age homes established by municipalities are subject to admission and other requirements (*Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13, s. 3).

Home Care

Home care consists of both medical care and home support services to individuals in their homes. It has become an increasingly important component of the health care system as funding constraints have led to lengthy waiting periods for hospital services and earlier discharges of patients following hospital procedures.

Home care is delivered in a number of ways across the country. In all Canadian jurisdictions, some home care is privately funded and delivered by for-profit businesses as well as by not-for-profit organizations like the Victorian Order of Nurses. In Saskatchewan and Manitoba, government employees funded by the state deliver services directly to certain residents. Nurses and other medical professionals working for the province provide some in-home health care services to eligible residents in Quebec and Alberta. In Quebec, home support services are provided to some residents in partnerships between the government and not-for-profit providers. Most government-funded home care services in Ontario and British Columbia and non-professional home care services in Alberta are supplied to eligible adults by for-profit and not-for-profit firms that get business by winning a competitive tender.[142] At least seven provinces provide funding (directly or through service vouchers) to eligible disabled adults to hire their own home care providers.[143] Overall, one half (½) of home care operators are fully funded from the public purse and

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[142] Fuller, above note 116, at 28. In Ontario, some home services, like Meals on Wheels, are funded directly (Fuller, *ibid.*, at 34). In British Columbia, under the *Health Authorities Act*, R.S.B.C. 1996, c. 180, s. 3(3), the Minister of Health is directed to ensure that health services are delivered predominantly by non-profit organizations.

[143] Romanow Report, above note 5, at 173-175; *CCPA Report on Health*, above note 111, at 28.

93% receive some public funding.[144] Some of the private providers of home care services are American.[145]

Summary

On the basis of the foregoing, it is possible to characterize health care services in Canada in general terms. Health care services in Canada are delivered and funded in diverse ways involving a significant component of public funding but delivered almost entirely by a range of private service suppliers. Basic health care in Canada is funded by the state. Governments are extensively involved in basic health care delivery by hospitals; physicians are also highly regulated. Supplementary health care (including the services of physicians and hospitals outside state funding and the services of all other health care professionals, nursing homes, old age homes and home care) is substantially privately funded, though provincial programs provide varying degrees of state funding, much of which is targeted in different ways to eligible individuals. The delivery of supplementary health services is regulated to varying degrees by provincial and territorial governments.

The table below summarizes this general characterization. Admittedly, this characterization cannot fully account for all aspects of health services in Canada, but it does provide a sufficient overview to permit some observations regarding the probable application of the GATS as set out in Sections 6 and 7 of this study.

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[144] *CCPA Report on Health*, *ibid.* Fuller provides a detailed account of the various home care systems across the country (Fuller, above note 116, at 24-50). See also, R. Sutherland, *The Cost of Contracting Out Home Care: A Behind the Scenes Look at Home Care in Ontario* (Toronto: CUPE Research, 2001).

[145] Fuller, *ibid.*, at 28; Jackson & Sanger, above note 8, at 85-7. Fuller identifies the major US supplier as Olsten Corporation. The *CCPA Report on Health* identifies Caremark as an American home care provider operating in Canada but concludes that there is no reliable data on foreign participation in the industry (*ibid.*, at 30).

Funding and Delivery of Health Services

Funding	**Delivery**
Hospital Services (including services of physicians and other health professionals in hospitals)	
1. Medically necessary: - Public	1. Private, not-for-profit (subject to licensing, and control over management, services, budget and location and public accountability), and some private for-profit
2. Not medically necessary: - Private	2. Private, for-profit and not-for-profit
Physician Services	
1. Medically necessary: - Public	1. Private, for-profit (subject to state set pricing and licensing, self-regulation)
2. Not medically necessary: - Private	2. Private, for-profit (subject to licensing and self-regulation)
Services of other health professionals (including alternative/complementary services)	
Private Provinces and territories pay for some services, including services for targeted groups	Private, for-profit (subject to licensing or certification in some cases, self-regulation or unregulated)
Nursing home services (including services of health care professionals and support services other than state funded medical and health care professional services)	
Public and Private	Private, for-profit (subject to state set pricing and licensing, including comprehensive standards regulation)
Homes for the aged	
Private and Some public for targeted groups	Public and Private, for-profit and not-for-profit (subject to licensing in some provinces)
Home Care (including services of health care professionals and support services other than state funded medical and health care professional services)	
Private and Some public for targeted groups	Public (Saskatchewan, Manitoba), (Quebec & Alberta - health professionals only) Private, for-profit and not-for-profit (other provinces)

(b) Education

Introduction

The WTO Secretariat's Services Sectoral Classification List, used by most Members to schedule their GATS commitments in specific sectors, provides little guidance on how to define education services.[146] Broadly conceived, education services in Canada include not only primary and secondary education and higher education at colleges and universities, but also adult education, a wide variety of commercial training programs, tutoring services and the federal government's citizenship education programs.

In Canada, the pattern of funding and delivery of education services ranges from publicly run and funded programs to private for-profit courses funded entirely by student fees. Canada's system of publicly funded primary and secondary schools, colleges and universities fulfills important public policy functions, including securing Canadians' basic entitlement to primary and secondary education,[147] facilitating the productive participation of Canadians in an increasingly knowledge-based economy and promoting the advancement of knowledge, research and innovation.

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[146] The Secretariat's Classification simply identifies the following general categories: Primary Education Services, Secondary Education Services, Higher Education Services, Adult Education and Other Education Services (W/120, above note 38). The United Nations Provisional CPC, above note 38, adds little in the way of elaboration. See Provisional CPC code 92.

[147] The state's obligations concerning education are recognized in the *International Covenant on Economic, Social and Cultural Rights* (1966), 993 U.N.T.S. 3, 1976 Can. T.S. No. 46 (entered into force 19 May 1976)[*Economic, Social and Cultural Rights Covenant*]. Art. 13(9) provides as follows "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and freely available to all; (b) Secondary education in all its different forms…shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education." Art. 13(10) states that "The States Parties to the Present Covenant undertake to have respect for the liberty of parents…to choose for their children schools, other than those established by the public authorities…" These provisions of the Covenant suggest that at least primary and secondary education is a government responsibility (cited in Grieshaber-Otto and Sanger, above note 7, at 13-14). The WTO Secretariat has described education up to a certain point as being regarded as a "basic entitlement" throughout the world (WTO, Council for Trade in Services, *Education Social Services: Background*

Education at all levels is primarily a provincial and territorial responsibility. Under the *Constitution Act, 1867*,[148] the provinces and territories have exclusive jurisdiction to enact laws governing education.[149] Consequently, Canada has discrete public education systems in each province and territory and is the only OECD country without a federal ministry responsible for education.[150] The federal government's exclusive legislative authority in relation to "Indians, and Lands reserved for Indians"[151] provides it with the constitutional authority to exercise jurisdiction over the education of some of Canada's Aboriginal peoples. The federal government also operates citizenship-training programs.

Commercial education and training has emerged as an important sector of education services. Specialized programs have developed to respond to the demand for adult training and "lifelong learning" opportunities. Demand for commercial training has intensified with the transition towards a knowledge-based economy in Canada. Distance learning has grown tremendously with developments in technology and the increasing familiarity of people with technology-based delivery methods. Suppliers

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Note by the Secretariat, 1998 (S/C/W/49)[*WTO Secretariat Note on Education Services*], at 4). Industry Canada has expressed a similar view (Industry Canada - Commercial Education, above note 12, at 2).

[148] 30 & 31 Vict., c. 3, s. 93.

[149] In addition to this plenary power, s. 93(1)-(4) of the *Constitution Act, 1867* sets out rights to denominational education. This refers to Roman Catholics or Protestants having their own denominational school systems. Constitutionally, provincial laws about education may not prejudicially affect the rights to denominational schools that were in effect at the time of Confederation. Accordingly, these rights are different in each province depending on the laws in effect at the time they joined Confederation. Section 23 of the *Constitution Act*, 1982, en. by the *Canada Act, 1982* (U.K.), c. 11, s. 1 deals with minority language education rights. This refers to the entitlement of the French-speaking or English-speaking linguistic minority in a province having access to instruction in their first language. For more information, see A. Brown & M. Zuker, *EDUCATION LAW*, 3d ed (Toronto: Thomson Carswell, 2002)[*EDUCATION LAW*].

[150] Grieshaber-Otto & Sanger, above note 7, at 18.

[151] *Constitution Act, 1867*, s. 91(24).

include private sector training firms as well as firms in other businesses doing their own in-house training. Provincial and territorial governments regulate the functions of some private training operations to a limited extent.

The traditional providers of higher education in Canada, universities and colleges are also responding to these changes in demand for educational services. They are offering more and more of their programs through distance learning technologies. Alberta's Athabasca University, for example, offers a wide array of degree programs completely on-line. As well, these institutions are offering new programs outside their traditional core activities. These include executive and other adult education programs. Such programs have been attractive, in some cases, as an additional source of funding for cash-strapped institutions.

A large number of services activities that are essential to the delivery of educational services would not be considered educational services in themselves. Some are specialized services closely related to education, such as providing guidance and counselling services, while others are general support services, such as secretarial and data processing services. These services are not characterized as education services for the purposes of this study.[152]

Increasingly, education services are traded. In Canada, large numbers of foreign students attend Canadian universities every year and thousands of Canadian students travel abroad to attend foreign institutions.[153] Such study abroad is the primary mode of trade in education services but the cross-border supply of education services has been made feasible by the Internet and is rapidly growing. A few Canadian institutions have set up a commercial presence to offer programs abroad[154] and some foreign universities are operating in Canada.[155] Many Canadian scholars provide their services on a temporary basis abroad each year and, in the same way, significant numbers of foreign scholars work in Canada.

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[152] Grieshaber-Otto & Sanger, above note 7, provide a comprehensive listing of such services and their classification under the Provisional CPC, above note 38, at 36-37.

[153] In 2001, over 130,000 foreign students were studying at Canadian universities (Citizenship and Immigration Canada, *Foreign Students in Canada 1980-2001* (2003), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/srr/research/foreign-students/students.html#_Toc32910765> (date accessed November 17, 2003)).

Changes in the funding and delivery of primary, secondary and as well as higher education are continually taking place driven, in large part, by reductions in public funding. As with health care, the diverse and dynamic character of the delivery and funding of education makes it difficult to arrive at firm conclusions regarding the application and impact of the GATS. In the following sections, a general overview of education services in Canada is provided.

Education Services Delivery[156]

Primary and Secondary Education

The provinces are responsible for the delivery and regulation of primary and secondary education. In most provinces, the operation of the public school system is delegated to bodies known as school boards. Legally, school boards are municipal institutions with no independent constitutional status; they are delegates of provincial jurisdiction.[157] Through legislation, regulations, guidelines and policies, the provinces and territories dictate the manner in which school boards are run. Provincial ministries of education and school boards decide whether public schools should be opened or closed, set curriculum and otherwise exercise comprehensive control over the operation of public schools.

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[154] For example, the University of Ottawa offered an executive MBA program in Hong Kong for several years.

[155] For example, the foreign-owned, for-profit university, DeVry Institute of Technology, was recently permitted to operate as a degree-granting institution in Alberta.

[156] Unlike health services, delivery of education services and social services is not determined by the structure of funding, so delivery will be discussed first in this section and in the following section on social services.

[157] *Public School Boards' Assn. (Alberta)* v. *Alberta (Attorney General)*, [2000] 2 S.C.R. 409, at paras. 34-35. Under Ontario's *Education Act* (R.S.O. 1990, c. E.2)[*Ontario Education Act*], each school board is a corporation (s. 58.4).

As a result of the combination of provincial power over education with denominational education rights and minority language education rights, school board systems vary across the country. There is no single national model. For example, Newfoundland has a secular school board system, while Alberta publicly funds both secular and separate Catholic and protestant schools, each administered by their own boards, as well as nine (9) charter schools.[158] The purpose of the school systems in each jurisdiction is to provide free publicly funded education. Students have the right to attend the public school serving the school district in which they live.[159] Some public schools offer instruction to foreign students in Canada.[160]

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[158] School board composition varies from province to province. For further details, see Grieshaber-Otto & Sanger, above note 7, at 18-22 and Canadian Tax Foundation, Finances of the Nation 1999 (Ottawa: Canadian Tax Foundation, 2000), at ch. 10) [Finances of the Nation 1999]: Alberta: 69 school authorities—41 public, 16 separate (15 Catholic, 1 Protestant), 3 francophone and 9 charter schools (charter schools are autonomous public schools employing distinctive approaches to the delivery of education, serving specific populations of students, and/or based on a particular educational philosophy or curricular focus);British Columbia: 59 local school boards and 1 francophone education authority; Manitoba: 56 local school boards, with no separate system or linguistic boards; New Brunswick: Dual English and French systems, each with a single province-wide board; Newfoundland: 10 non-denominational boards and 1 province-wide francophone board; Northwest Territories: 32 school divisions, including both public and separate (Roman Catholic) systems in Yellowknife; Nova Scotia: 7 school boards, 6 regional boards and 1 francophone-Acadian board; Ontario: 72 district school boards, including 12 francophone district boards; 37 school authorities responsible for isolated and hospital schools; Prince Edward Island: 3 regional school boards, no separate school system; Quebec: separate English- and French-language school boards (72 in total); Saskatchewan: 118 school divisions—88 public, 22 Roman Catholic, 8 francophone; Yukon: 28 public schools administered by the territorial Department of Education; a French language school board was established in 1996.

[159] *E.g.*, Ontario *Education Act*, above note 157, s. 16; Nova Scotia *Education Act*, S.N.S. 1995-6, c. 1 [*Nova Scotia Education Act*], s. 5; and British Columbia, *School Act*, R.S.B.C. 1996, c. 412 [*British Columbia School Act*], s. 2.

[160] The New Westminster District School Board, for example offers such programs, NWDSB http://www.sd40.bc.ca/iep/ (accessed March 24, 2004).

In addition to these public primary and secondary schools, there are also private primary and secondary schools. Most, but not all, operate on a not-for-profit basis. In order to operate, a private school must receive approval from the province or territory in which it is situated. Approval does not necessarily reflect an assessment of the school's teaching quality or the competence of the teachers; it simply means the province or territory accepts that the school satisfies the criterion of "satisfactory instruction" set in local legislation.[161] As well, private schools are not subject to the same level of regulation as public schools. For example, private schools may not be required to hire teachers who are members of the provincial regulatory body. Private school curricula need only comply with provincial policies if the school wishes to grant credits toward a secondary school diploma.

Some private Canadian schools operating abroad offer courses for credit toward Canadian secondary school diplomas.[162] As well, a number of foreign schools offer Canadian curricula and credit toward Canadian secondary school diplomas in foreign jurisdictions with the approval of the relevant provincial authority and with varying degrees of involvement from Canadian public schools.[163]

Attendance at a public school or private school that meets provincial or territorial criteria is mandatory from the age of five (5) or six (6) to 16.[164] In most Canadian jurisdictions, distance education over the Internet is available to some or all students as an alternative to in-class instruction.[165] Home schooling is permitted provided certain requirements are satisfied.[166]

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[161] *E.g.*, Ontario *Education Act*, above note 157, s. 16; Nova Scotia *Education Act*, above note 159, ss. 130-132; *Independent School* Act, R.S.B.C. 1996, c. 216. See generally, *EDUCATION LAW*, above note 149, at 72.

[162] Schools approved by the Ontario Ministry of Education that operate abroad are listed, online: Ontario Ministry of Education <http://www.edu.gov.on.ca/eng/general/list/oversea.html> (date accessed March 23, 2004). An annual inspection by the Ministry is required.

[163] The British Columbia Government recently approved 20 schools in Japan, Taiwan and China to give courses for credit toward a British Columbia secondary school diploma working with school district companies, independent schools and consultants (B.C. government press release, September 14, 2002 "Offshore School Program Expands" online: BC <http://www2.news.gov.bc.ca/nrm_news_releases/2002BCED0019-000806.htm> (date accessed March 24, 2004)[*BC Press Release on Offshore Schools*].

Post-Secondary Education

As with primary and secondary education, post-secondary education is under the jurisdiction of provincial and territorial governments. Each jurisdiction has established a regulatory scheme under which the offering of programs is approved.

A number of different types of institutions make up this part of the education sector. Generally speaking, universities and colleges are the principal providers of post-secondary education. The purely commercial service providers described in the next section round out the sector. There is significant variety in both the nature of post-secondary institutions and the structure of regulation from one Canadian jurisdiction to the next.[167] As well, because of the changing roles of post-secondary institutions distinctions among them are becoming increasingly hard to draw.

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[164] *E.g.*, Ontario *Education Act*, above note 157, s. 27; and Nova Scotia *Education Act*, above note 159, ss. 111, 130-131.

[165] In British Columbia, these services are provided through the Open School, www.openschool.bc.ca (accessed March 23, 2004). In Ontario, courses are offered through the Independent Learning Centre, ILC http://www.ilc.org/upgrade.html (accessed March 23, 2004).

[166] *E.g.*, Ontario *Education Act*, above note 157, s. 21(2)(a); Nova Scotia *Education Act*, above note 159, s. 128.

[167] In British Columbia, the regime is complex reflecting the number of different types of degree-granting institutions: universities obtain authority to grant degrees according to the *University Act*, R.S.B.C. 1996, c. 468, except Royal Roads University which has such authority under the *Royal Roads University Act*, R.S.B.C. 1996, c. 409; university colleges and institutes of art and design obtain degree-granting authority from the *College and Institute Act*, R.S.B.C. 1996, c. 52; institutes of technology obtain degree-granting authority from *Institute of Technology Act*, R.S.B.C. 1996, c. 225; the open university obtains its degree-granting authority from the *Open Learning Agency Act*, R.S.B.C. 1996, c. 341. Both Quebec and Alberta have open universities as well as regular universities. By contrast, under the current regime in Ontario, degree-granting authority is given only to universities and under a single act: *Post-Secondary Choice and Excellence Act, 2000*, S.O. 2000, c. 36 [*Ontario Post-Secondary Choice Act*].

Universities offer programs of instruction leading to degrees and conduct about one-quarter of all research in Canada.[168] Most publicly funded universities are established by individual acts of a provincial government or are otherwise recognized under provincial law as degree-granting institutions.[169] They are autonomous institutions operating as not-for-profit private corporations, in which ultimate responsibility for management rests with the governing board.[170] Their objects which define their powers are set out in their governing legislation or their charter documents or both. Universities establish their own academic and admissions policies, decide what programs to offer and what staff appointments to make, and have significant flexibility in the management of their financial affairs. Subject to their substantial reliance on provincial grants, as discussed below, they have control over their budgets. Government intervention with respect to universities is limited to grants provided, student fee structure and approval of the introduction of new degree programs. Degree programs are subject to periodic government review.[171] Usually, the province in which a university operates has a right to nominate some number of members of the board of governors, though typically these nominees need not be government officials.[172] In some provinces, privately owned for-profit and not-for profit universities may be founded or given permission to operate with the power to grant degrees.[173]

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[168] Canadian Information Centre for International Credentials, *Post Secondary Education in Canada: An Overview*, CICIC www.cicic.ca/postsec/vol1.en.stm (accessed November 11, 2003)[*CICIC Overview*].

[169] There are over 200 degree-granting institutions operating in Canada, including those that are financed significantly by the state, as well as those that are financed primarily by student fees. See *CICIC Overview*, *ibid.*

[170] Ontario Ministry of Education and Training, *Future Goals for Ontario Universities and Colleges*, (Toronto: Ministry of Education and Training, 1996), at 6.

[171] Canadian Information Centre for International Credentials, *Quality Assurance Practices for Post-Secondary Institutions in Canada*, 2002.

[172] See, for example, *University of Ottawa Act, 1965*, S.O. 1965, c. 137, s. 9(c).

[173] In Ontario, a scheme for giving degree-granting powers to privately funded universities is created under the *Ontario Post-Secondary Choice Act*, above note 167. In British Columbia, private post-secondary schools are regulated under

Colleges are teaching institutions that offer services primarily to the local community to meet the training needs of various industries, providing diplomas or certificates for vocationally oriented educational programs, including apprenticeship programs as discussed in the next section.[174] While most colleges are established and governed under provincial or territorial legislation and operate on a not-for-profit basis, some provinces permit purely private colleges to operate as independent for-profit businesses[175]

Each publicly funded college is governed by a board of governors responsible for the effective and efficient operation of the college. The provincial or territorial Minister of Education is responsible for the governance of the provincial system of publicly funded colleges as a whole. With respect to these colleges, government intervention can extend to admissions policies, curriculum, institutional planning and working conditions, in addition to funding, fee structures and the approval of new programs.[176] Boards are often appointed entirely by the provincial or territorial government, but seldom must they consist of government representatives.

In some provinces and territories, there are also "community colleges," "colleges of applied arts and technologies," "institutes" and "university colleges" that combine university and college traditions to offer students both degree programs and college diplomas and certificates with the latter often leading into the former.[177]

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the *Degree Authorization Act*, S.B.C. 2002, c. 24 (not yet in force). In other provinces, such as Nova Scotia, there are no privately funded universities. In 2001, Alberta granted degree-granting privileges to DeVry Institute of Technology which is controlled by a for-profit publicly traded US corporation. The University of Phoenix, also controlled by a for-profit publicly traded US corporation, operates a campus in Burnaby offering courses for credit toward degrees recognized in Arizona. It is not a recognized degree-granting institution in British Columbia.

[174] There are over 200 colleges and similar institutions in Canada. Of these, 140 have been created by the provinces and territories (*CICIC Overview*, above note 168). In Quebec, Colleges of General and Vocational Education, or Cégeps, provide a two- or three-year general or technical education between high school and university.

[175] *CICIC Overview*, *ibid.*

[176] *Ibid.*

[177] *E.g.*, British Columbia, Alberta, Ontario and Nova Scotia each have one or more of these types of institutions.

There is no national accrediting body for post-secondary institutions in Canada. Membership in the Association of Colleges and Universities of Canada is generally regarded as evidence of acceptable standards.

Commercial Training

Commercial training is a dynamic and rapidly growing sector in Canada.[178] Training takes place in a variety of settings, including private vocational schools and employer-sponsored in-house training.[179] Private tutoring for primary and secondary students is an increasingly significant area of commercial training.[180] More and more, universities and colleges are engaged in commercial training.[181]

Provinces and territories regulate only some of these activities and to varying degrees. In-house training programs are not subject to regulation. Provinces and territories do set standards for qualification to work in certain trades and occupations and regulate the operation of commercial training schools to some extent.

In Ontario, for example, all "private career colleges" providing vocational training must register under the *Private Career Colleges Act*.[182] Registration is conditional on the school meeting certain requirements regarding curricula, teacher qualifications, advertising and refund policies.[183] Registration is not required for organizations offering training that is not directed to specific vocations such as courses in driving non-commercial vehicles, speed reading and health and fitness, or courses of short duration (less than 24 hours).

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[178] Industry Canada - Commercial Education, above note 12.

[179] Industry Canada - Commercial Education, *ibid.* See also P. Sauvé, "Trade, Education And The Gats: What's In, What's Out, What's All The Fuss About?" (Paris: OECD, 2002) [*Sauvé*], at 5-6.

[180] Grieshaber-Otto & Sanger, above note 7, at 59-60.

[181] Industry Canada - Commercial Education, above note 12, at 5, 9.

[182] R.S.O. c. P.26, s. 4. Standards are fixed in O. Reg. 939.

[183] The Ontario regime is described on the Ministry of Training and Colleges web site, online: Ministry of Training and Colleges <www.edu.gov.on.ca/eng/general/private.html> (date accessed March 23, 2004).

One important type of vocational training offered in all Canadian jurisdictions is apprenticeship. Provincial and territorial ministries work with industry to establish standards for the certification of persons to work in specific trades and occupations. Obtaining a certificate of qualification typically requires a period working as an apprentice or comparable experience. Ministries approve certain private schools (both for-profit and not-for-profit) and publicly funded colleges as competent to deliver training leading to the fulfillment of the requirements for an apprenticeship. A trainer may not be approved where the ministry determines that there is insufficient demand. Some trades, such as automotive service technicians, may not be practiced except by an apprentice or someone who has received a certificate of qualification. Industry experience, including experience obtained abroad, may be recognized as equivalent to apprenticeship training. Once the apprenticeship or equivalent experience requirement has been satisfied by a tradesperson, he or she may be required to sit a qualifying examination administered by the province or territory in order to be certified.[184]

Citizenship Training

Education about Canadian customs, practices and laws is necessary for the smooth integration of the many immigrants Canada receives every year. Language training in either or both of the official languages is available free-of-charge to new adult permanent residents. This program—sponsored by the federal government, in co-operation with provincial governments, school boards, community colleges and immigrant-serving organizations—is called Language Instruction for Newcomers to Canada.[185]

In addition, the federal government sponsors learning materials on Canada that are made available to the general public.

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[184] Human Resources and Skills Development Canada sponsors the "red seal" program, under which the provinces and territories work toward common standards and mutual recognition for trades and occupations, online: HRSDC <http://www.red-seal.ca/english/index_e.shtml> (date accessed March 24, 2004).

[185] In French, the program is called Cours de Langue pour les Immigrants au Canada. For more information on citizenship education programs by the federal government, see the website of Citizenship and Immigration Canada, online: CIC <www.cic.gc.ca/english/newcomer/welcome.html> (accessed March 26, 2004).

One of the principal sources of this funding is the Canadian Studies Program of Heritage Canada.

Individual Education Services Suppliers

The individuals who actually deliver all types of education services work either as employees or independent consultants. Teachers and professors typically work as employees of public or private educational institutions, though some carry on business as independent consultants. In order to teach in public schools, teachers must meet standards of competence set by the province or territory.[186] Teacher quality is also assessed by provincial and territorial agencies responsible for licensing colleges and private organizations offering vocational training. There are few government standards for teachers and professors in private schools or independent education consultants.

Education Services Funding

Primary and Secondary Education

With very limited exceptions, public primary and secondary schools receive their public funding from general provincial or territorial government revenues. In several provinces, funding comes entirely from general revenues. Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and Saskatchewan also employ property taxes to raise funds for education. In Yellowknife, schools are funded in part by a local property tax while schools in the rest of the North West Territories are funded directly from territorial revenues. Another exception is Nova Scotia, where education funding comes in part from municipal, as well as from provincial, revenues.[187]

Public funding for public primary and secondary schools is provided separately for operating and capital expenses. A significant portion of operating grants is tied to the anticipated number of students at each school.[188]

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[186] The structure of this regulation varies from province to province. Since 1997, practice standards and other aspects of the regulation of teachers in Ontario have been administered by the Ontario College of Teachers established under the *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12.

[187] Grieshaber-Otto & Sanger, above note 7, at 18-22 and *Finances of the Nation 1999*, above note 158, ch. 10.

While section 93 of the *Constitution Act, 1867* imposes obligations on the provinces with respect to denominational education, provinces have the discretionary power to provide funding to schools of all religious denominations. Many of Canada's private schools were founded because a religious or ethnic community wanted to combine religious or ethnic instruction with other subjects.[189] In certain jurisdictions, separate school boards can tax locally to raise funds for denominational education.[190] However, the province can remove this right as long as the denominational aspect of the education is not affected.[191]

Many privately funded primary and secondary institutions coexist alongside public schools. Some provinces and territories, but not all, fund private religious schools, either wholly or partially.[192] Funding of specific religious schools does not give rise to a legal requirement in that province or territory to fund other religious schools.[193] Some provinces fund other private schools as well. In most cases, funding includes per-pupil grants.[194]

All public schools have sought to supplement public funding with a range of private sources of funds, including fees paid for particular activities and voluntary contributions by parents, fund-raising activities and sponsorships from private businesses.[195] Outright commercial activity by public schools is precluded under some provincial statutes,[196] but is encouraged in other jurisdictions. The following are examples of commercial activities undertaken by schools in British Columbia.

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[188] See, for example, British Columbia Ministry of Education, *Policy Document: K-12*, <www.bced.gov.bc.ca/k12funding/welcome.htm> (accessed June 12, 2003); Ontario Ministry of Education and Training, *Student-Focused Funding*, <www.edu.gov.on.ca/eng/funding/index.html> (accessed June 12, 2003).

[189] *EDUCATION LAW*, above note 149, at 74.

[190] For example, in Alberta, separate school boards can collect property taxes only from local residents, but they must opt out of the regular, pooled funding system to do so.

[191] *O.E.C.T.A.* v. *Ontario (Attorney General)*, [2001] 1 S.C.R. 470.

[192] *EDUCATION LAW*, above note 149, at 12-13.

[193] This was confirmed by the Supreme Court of Canada in *Adler* v. *Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th) 407. In this decision, the Supreme Court held that the *Charter* is not infringed by reason of the failure of a province to fund religious private schools.

[194] Funding varies significantly from one jurisdiction to the next. No funding is provided in the Maritime provinces, Federation of Independent Schools in Canada http://www.independentschools.ca/funding.htm (accessed November 17, 2003).

- Thirty-eight school districts have sought to recruit fee-paying foreign students. The Vancouver School Board, for example, actively seeks foreign students for its grade 9-12 program and charges them $11,000 per year.[197]
- Since 2002, British Columbia school boards have been permitted to set up for-profit corporations (called "school district corporations") to carry out commercial activities for the purpose of earning revenues to support the delivery of public education services.[198] Such corporations have already been set up by several school boards, including those in Vancouver and New Westminster, to sell educational programs and consulting services both in Canada and abroad.[199]
- The British Columbia Government recently approved 20 schools in Japan, Taiwan and China to give courses for credit toward a British Columbia secondary school diploma, working with school district companies, independent schools and consultants.[200]

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[195] Grieshaber-Otto & Sanger, above note 7, at 50-61.

[196] *E.g.*, Nova Scotia *Education Act*, above note 159, s. 2. Section 10 prohibits commercial activities, except with the approval of the provincial cabinet.

[197] Grieshaber-Otto & Sanger, above note 7, at 52-53. It has been suggested that, at this price, the Board is making $5,000 in profit for each foreign student (L. Kuehn, "B.C. Government promotes privatization and a market approach to education" http://www.bctf.bc.ca/notforsale/privatization/MarketSchools.html (accessed March 24, 2004). Other schools across the country engage in similar activities. For some boards, foreign student fees contribute as much as 20% of their total budget.

[198] British Columbia *School Act*, above note 159, part 6.1.

[199] See, for example, the District School Board for New Westminster: http://www.sd40.bc.ca/SD40BC/sd40bc%20index.htm (accessed March 24, 2004).

[200] BC Press Release on Offshore Schools, above note 163.

While it is difficult to determine the significance of these activities in terms of the number of schools involved, or their financial impact, it appears to be a growing phenomenon which is being facilitated by provincial government initiatives and spurred on by continuing funding constraints.

Post-Secondary Education

Unlike primary and secondary education, a sizeable portion of the public funding for post-secondary education comes from the federal government through the Canada Health and Social Transfer paid to the provinces. With this support, the provinces make annual allocations to universities, colleges and similar post-secondary institutions for operating and capital expenses. Some of this funding is tied to student enrolment. Provinces that permit the operation of privately funded post-secondary degree-granting institutions do not provide them with public assistance.

In the 2001-2002 academic year, Ontario universities received from the province $5.9 billion, which covered approximately 61% of their total expenditures of $9.6 billion.[201] The funds received in 2001-2002 were 17% less than those received in 1992-1993.[202]

Increasingly, funding is provided by student fees. Most provinces have facilitated this by permitting universities to increase tuition fees. In 2001-2002, student fees represented 31% of universities operating revenues.[203] Ancillary sources of revenue, such as book stores, student residences and food services are generally provided on a cost recovery basis[204] Such sources contributed 8% of total revenues in the same year.[205] As well, universities receive funding from research grants, endowments and donations. Most significantly, as noted above, universities are increasingly involved in other activities, such as executive, computer and information-technology training and adult education and training programs, as well as contract research, some of which they conduct on a for-profit basis.[206]

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[201] Association of Universities and Colleges of Canada, *TRENDS IN HIGHER EDUCATION* (Ottawa: AUCC, 2002), at 61.

[202] *Ibid.*

[203] *CICIC Overview*, above note 168.

[204] *E.g., Queen's University at Kingston - Annual Report for 2002-03*, online: http://www.queensu.ca/fins/annualreport/2003/pdf/annualreport_02-03.pdf> (date accessed March 24, 2004), at 23.

[205] *Trends in Higher Education*, above note 201, at 66.

Many universities have programs to support and profit from the commercial exploitation of university research. McGill University, for example, underwrites the cost of setting up new firms to sell professors' inventions and takes a share of the resulting revenues.[207] The University of Calgary has a wholly owned subsidiary corporation, University Technology International Inc., which provides a full range of commercialization services to inventors of technology from the University of Calgary and other clients.[208] The Association of Universities and Colleges of Canada anticipates that even more support for commercialization will be provided by universities in the future.[209]

Colleges also rely heavily on public funding.[210] As with universities, some of this funding is based on student enrolment. Like universities, many colleges are seeking new sources of revenues to invest in innovative new programs, services, equipment and facilities. At some colleges, profits from food services, parking lots, book stores and residences and other ancillary services are used to supplement public funds for educational programming.[211] In most cases, the balance of college funding requirements in excess of government funding and ancillary fees is obtained from student fees.

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[206] Association of Colleges and Universities of Canada, *The GATS and Higher Education in Canada: An Update on Canada's Position and Implications for Canadian Universities* (Ottawa: AUCC, 2003)[*AUCC Update*], at 11.

[207] N. Tudiver, *UNIVERSITIES FOR SALE: RESISTING CORPORATE CONTROL OVER HIGHER EDUCATION* (Toronto: Lorimer, 1999)[*Tudiver*], at 157.

[208] University Technologies International Inc.: www.uti.ca (accessed March 25, 2004). The University of Guelph has a similar subsidiary (Tudiver, *ibid.*).

[209] *TRENDS IN HIGHER EDUCATION*, above note 201, at 66.

[210] In the 1994-95 academic year, for example, Ontario Colleges of Applied Arts and Technology received from the province $808 million in operating funds, which covered approximately 48% of their total expenditures of $1.7 billion (*EDUCATION LAW*, above note 149, at 5).

[211] See, for example, the financial statements for Algonquin College for 2002-2003: www.algonquincollege.com/pr/Financials.pdf (accessed March 30, 2004).

Provincial and territorial governments provide some financial assistance to students for post-secondary education and training. Generally, these programs are only available for those who are in need of assistance as determined based on the criteria set in each program. Most assistance is in the form of loans that must be repaid in full, with interest, once the student has graduated. The specifics of each program, including who is eligible and how much is available per year, vary from one Canadian jurisdiction to the next. Human Resources and Skills Development Canada administers the Canada Student Loan program which promotes accessibility to post-secondary education by lowering financial barriers through the provision of loans and grants for Canadians with a demonstrated financial need.[212] In most cases, students at privately funded post-secondary institutions remain eligible to receive government support.

Commercial Training

Most commercial training takes the form of specific vocational training and takes place in licensed private vocational schools or through employer-sponsored training. None of these service suppliers receives significant public funding, except for some apprenticeship programs. The primary source of funds is student tuition fees. Students at some private training schools are eligible to receive provincial loans. Some provinces, like Quebec, offer tax credits as incentives to employers to provide training to their employees.

The provinces fund apprenticeship training through *per diem* payments to training institutions. For students who are eligible for Employment Insurance, the federal government provides funds to the provinces to pay for in-school apprenticeship training. In some cases, a daily classroom fee may have to be paid by the student.[213]

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[212] See online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/program/cslp.shtml> (date accessed March 30, 2004).

[213] In Ontario, for example, training institutes receive $52.23 per day (on average) from the province for in-school training and students must pay $10. Under the Ontario Youth Apprenticeship Program, students involved in a high school cooperative program are exempt from the student fee.

Citizenship Education

Education about Canadian customs, practices and laws to recent immigrants is provided free of charge by the Federal government, as administered by Citizenship and Immigration Canada. Other citizenship education is funded by Heritage Canada.

Individual Education Services Suppliers

As noted, teachers and professors typically work as employees of public or private educational institutions. Some carry on business as independent consultants.

Summary

On the basis of the foregoing analysis, education services in Canada may be characterized in general terms, as set out in the table below. Again, as with health services, this characterization does not and cannot fully reflect the diversity of education services in Canada.

Education Services Funding and Delivery

Funding	Delivery
Primary and Secondary Education	
1. Public (supplemented by some schools in some provinces through for-profit activities)	1. Public
2. Private with some public in some provinces	2. Private (for-profit and not-for-profit) subject to some standards regulation
Higher Education (colleges and universities)	
1. Public and private	1. Private (not-for-profit) subject to licensing and some standards regulation
2. Private	2. Private (for-profit and not-for profit) subject to licensing and some standards regulation
Commercial Training	
Private	Private (subject to licensing and standards regulation in some cases)
Citizenship Education	
Public	Public and private (not-for-profit)
Education services supplied by individual educators (teachers, professors and trainers)	
Public and Private	Private (subject to standards regulation and state set compensation in public schools)

(c) Social Services

Introduction

Defining what services fall into the category of "social services" is not a simple exercise. The Services Sectoral Classification List,[214] used by most WTO Members to classify services sectors for the purpose of identifying the sectors in which they undertook specific GATS commitments, groups social services with health services.[215] But, while health services are further disaggregated into a number of sub-sectors, social services are not. The WTO Secretariat's Background Note on Health and Social Services[216] does not discuss social services in any meaningful way, devoting all of its analysis to the health sector. There is virtually no secondary literature discussing social services in the context of GATS.[217]

Conceptually, social services may be defined as encompassing government and other programs and services designed to assist citizens in satisfying their basic human needs, including food, shelter and a minimum level of financial security. Social assistance and Employment Insurance are commonly considered to be social services. Subsidized daycare, children's aid, family services, women's shelters, assisted housing and an array of other programs offered in provinces and territories across Canada would also fall within the definition of social services. These services involve a wide range of combinations of public and private delivery, government and private funding and different types of regulatory relationships between the state and the service providers.[218] Given this diversity and the absence of data on social services, it is beyond the scope of this study to address all social services in Canada. This study is limited to the following major social programs: Employment Insurance, the Canada Pension Plan, Old Age Security and provincial social assistance.

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[214] W/120, above note 38.

[215] The relevant portions of the classification list in W/120, *ibid.*, are set out in Appendix II to this study. The UN's Provisional CPC, above note 38, provides a breakdown of social services in classification 933.

[216] WTO, Council for Trade in Services, *Health and Social Services: Background Note by the Secretariat*, 1998 (S/C/W/50) [*WTO Note on Health and Social Services*].

[217] One of the few exceptions is the pioneering study recently released by the Canadian Council on Social Development and the Canadian Centre for Policy Alternatives: Jackson & Sanger, above note 8.

[218] See Jackson & Sanger, *ibid.*, at 14-78.

Social Services Delivery

Employment Insurance

Employment Insurance, as Unemployment Insurance has been called since 1996,[219] is a federally run program administered in accordance with the *Employment Insurance Act* (*EI Act*) by the Department of Human Resources and Skills Development Canada (*HRSDC*) directly through its offices throughout the country. HRSDC works in association with the Canada Employment Insurance Commission (*CEIC*), a public entity under the responsibility of HRSDC.[220] Under the *EI Act*, the CEIC is responsible for monitoring and providing an annual assessment of the program, reviewing and approving policies related to program administration, as well as handling an appeal process. It also has a role in the annual setting of the EI premium rate. However, this role has been suspended while a review of the premium rate-setting mechanism is being undertaken.

In order to receive regular Employment Insurance benefits, Canadian workers must meet certain eligibility requirements. The specific eligibility criteria depend on the unemployment rate in the region of Canada in which an applicant worked. Currently, the minimum number of hours worked within the qualifying period[221] needed to be eligible for benefits is normally between 420 and 700 insurable hours, with applicants needing to have worked more insurable hours the lower the unemployment rate in their region.[222] New entrants and re-entrants to the labour market require a minimum of 910 hours to qualify.[223]

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[219] In that year, the *Employment Insurance Act*, S.C. 1996, c. 23, repealed and replaced the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1 [*EI Act*]. The new act gave the federal program a new name and a new regulatory structure.

[220] The *Department of Human Resources Development Act*, S.C. 1996, c.11 (*HRD Act*), established Human Resources Development Canada (the predecessor to HRSDC) and created the Canada Employment Insurance Commission.

[221] The qualifying period is the shorter of the 52-week period immediately before the start date of the claim, or the period since the start of a previous Employment Insurance claim. However, the qualifying period may be extended to up to 104 weeks in specific special circumstances. For more information, see www.HRSDC/gateways/nav-top/program/ei.shtml (accessed March 24, 2004).

The EI program includes a separate benefits regime for self-employed fishers. Unlike regular benefits, qualification for fishing benefits is based on earnings, not hours worked. Under the earnings-based system, fishers can qualify for benefits with a minimum of between $2,500 and $4,200 in insured earnings from fishing, depending on the regional rate of unemployment. For new entrants and re-entrants to the labour force, a minimum of $5,500 of insured fishing earnings is required to qualify.

In addition, the EI program contains a special benefits regime that allows individuals to leave their employment temporarily if they are sick, pregnant, or caring for a newborn or newly adopted child. As of January 4, 2004, compassionate care benefits are available to workers who must be away from work temporarily to provide care or support to a gravely ill child, parent, or spouse. The entrance requirement for special benefits is 600 hours of insurable employment.

Canada Pension Plan

The Canada Pension Plan (*CPP*) is a federal, publicly run, contributory, earnings-related program administered by both the Canada Revenue Agency (*CRA*) and HRSDC. As well as providing pensions for older Canadians, the program pays other sorts of pensions, such as disability pensions. Legislative authority for the program and its administration is provided in the *Canada Pension Plan Act*.[224] Part I of the Act, dealing with the obligation to make and the process for making contributions, is the responsibility of the Minister of National Revenue, while the rest of the *Act*, setting out the benefits and administration of the plan, falls under the responsibility of HRSDC. With few exceptions, all persons in Canada over 18 and under 70 earning a salary must pay contributions to the CPP.

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[222] *Ibid.*

[223] *Ibid.*

[224] R.S.C. 1985, c. C-8.

All those over the age of 65 who have made contributions into the system are entitled to their pension without penalty. Access to the pension, with a financial penalty, is also possible between the ages of 60 and 64, if the person has stopped working or has low earnings. The CPP pension is based on a contributor's average annual contributions; benefits paid are supposed to represent 25% of the person's contributions (up to a monthly maximum). In order to gain access to one's pension benefits, application must be made to a program officer at HRSDC. Once an application has been made, the federal government, through HRSDC, sends cheques directly to the recipient or directly deposits the funds in the recipient's bank account on a monthly basis.

Those who have suffered a severe[225] and prolonged[226] mental or physical disability may be eligible for a CPP disability pension. Benefits from this pension are paid monthly to the disabled recipient and to the recipient's dependent children. In order to qualify for a CPP disability pension, a person must be under 65, must be disabled within the meaning of the legislation and must have made CPP contributions for a minimum number of years. Generally, a person must have made CPP contributions in four of the previous six years. During that period, an applicant must have earned at least 10 percent of each year's maximum pensionable earnings.

Old Age Security

The Old Age Security program actually consists of three basic programs: the Old Age Security Pension (which is separate from the CPP); the Guaranteed Income Supplement; and the Allowance for survivors of a deceased spouse. Each of these programs is administered by the Income Security Programs Branch of HRSDC.[227]

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[225] The *Canada Pension Plan Act*, *ibid.*, defines this as preventing one from working regularly at any job.

[226] Defined by the *Canada Pension Plan Act*, *ibid.*, as a condition that is long-term and may result in one's death.

[227] For a more thorough description of these programs and their re-

The Old Age Security Pension is a monthly benefit available to most Canadians 65 years of age or older. In order to receive this benefit, residency requirements must be met but the applicant need not be retired. In fact, the applicant's employment history and status is not relevant to determining eligibility. An applicant must be a Canadian citizen or legal resident of Canada and must have lived in Canada for at least 10 years after reaching age 18 to be eligible. Full benefits are conferred on those who have lived in Canada for periods totalling at least 40 years since reaching 18 years of age. Those receiving Old Age Security pensions must pay federal and provincial income tax on amounts received. Higher income pensioners repay part or all of their benefit through the tax system.

The Guaranteed Income Supplement is a monthly benefit paid to residents of Canada who receive a full or partial Old Age Security Pension and who have little or no income. Recipients must re-apply annually for this benefit. This benefit is not subject to income tax and is not payable to those living outside Canada.

The Allowance is a monthly payment that may be claimed by persons whose spouse or common-law partner has died, and in some other circumstances. This benefit is designed to recognize the difficult circumstances faced by many surviving persons and by couples living on the pension of only one spouse or common-law partner. Application for this benefit must be made annually. This benefit is not subject to income tax and is not payable to those residing outside of Canada.

Social Assistance (Welfare)

Each of Canada's provinces and territories designs, funds, administers, and delivers its own social assistance program to persons with low incomes. Benefits are distributed through the responsible provincial or territorial ministry or department. In addition, social assistance programs for Aboriginals living on reserves are administered by the federal government through the Department

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quirements, see the Old Age Security section of the HRSDC website, http://www.hrsdc.gc.ca/en/gateways/individuals/cluster/category/ppr.shtml (accessed March 23, 2004).

of Indian and Northern Affairs. Social assistance programs, in all instances, are considered to be programs of last resort, only to be used when all other sources of benefits have been exhausted. The name, specifics and level of benefits associated with the program vary from one jurisdiction to another. In Alberta, for example, the welfare program is called Income Support and is part of the Alberta Works program. Under Alberta's *Income and Employment Supports Act*,[228] the Alberta Department of Human Resources and Employment funds and administers the program. In contrast, Nunavut's welfare program is called Social Assistance and is administered by the Nunavut Department of Education, as set out in the *Social Assistance Act*.[229]

Most of the provinces have now tied benefits under these programs to some form of workfare or mandated participation in employment-enhancement or related activities. In all instances, those who are disabled or are otherwise unable to participate in the workfare activities can still receive benefits. Persons capable of participating in such activities who do not participate lose their benefits. These workfare and employment-enhancement activities are publicly run with most of the administrative work done by provincial or territorial government employees.

Social Services Funding

Employment Insurance

Employment Insurance is funded directly from payroll deductions at contribution levels set by the federal government. Both employers and employees must make contributions to this scheme. Employment Insurance deductions are taken from all employees' paid wages. Premiums are paid as a percentage of earnings and are payable on earnings up to a maximum of

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[228] S.A. 2003, c. I-0.5. The social assistance program in Newfoundland is called the Income Support Program and it is run by the Newfoundland Department of Human Resources and Employment, as set out in the *Social Assistance Act*, R.S.N.L. 1990, c. S-17.

[229] R.S.N.W.T. 1988, c. S-11. A major review of this program in 2000 resulted in a few government reports on the shape such a program should take in the future. Changes are being gradually implemented.

$39,000 a year.[230] Employers are also required to pay employment insurance premiums for each employee at 1.4 times the employee rate. Rates are set "to ensure that there will be enough revenue over a business cycle [to pay for expenditures]."[231]

Canada Pension Plan

As noted, virtually all persons in Canada over 18 and under 70 earning a salary must pay contributions to the CPP. The contribution is evenly divided between employees and employers; those who are self-employed must pay the full contribution amount. The level of contribution each person pays is based on the salary earned. Contributions are only paid on 'pensionable' earnings.[232] Contributions go directly to the federal government, which manages the pension plan, and are invested in provincial, territorial and federal bonds, short-term investments and equity securities. All benefits are paid out from the plan. Pensions for workers who have become disabled are also funded out of employee contributions in this way.

Old Age Security

The three basic programs in the Old Age Security Program are financed entirely from the federal government's general tax revenues.

Social Assistance (Welfare)

The provinces and territories fund their social assistance programs from general government revenues. As well, the federal government provides the provinces with some funds to finance such benefit programs through the Canada Health and Social Transfer. The federal government fully funds social assistance programs for Aboriginals living on reserves.

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[230] HRSDC, *Employment Insurance*, http://www.hrsdc.gc.ca/en/gateways/individuals/events/unemployment.shtml (accessed March 23, 2004).

[231] *EI Act*, above note 219, ss. 66, 66.1 and 66.2.

[232] These are earnings between the minimum level, frozen at $3,500, and the maximum level, which is adjusted every January based on increases in the average wage. For more information, see HRSDC, *Canada Pension Plan: General Information* <http://www.hrsdc.gc.ca/en/gateways/topics/cpr-gxr.shtml> (accessed March 24, 2004).

Summary

On the basis of the foregoing, it is possible to characterize the identified social services programs in general terms as set out in the table below. As noted, this characterization does not account for all aspects of social services but only those major programs mentioned.

Social Services Funding and Delivery

Funding	Delivery
Employment Insurance	
Public (with contributions from employees and employers)	Public
Canada Pension Plan and other special federal pensions	
Public (with contributions from pension beneficiaries and employers)	Public
Old Age Security	
Public	Public
Social Assistance	
Public	Public

5. Understanding the Exclusion for "Services in the Exercise of Governmental Authority"

(a) Introduction

As noted, the GATS does not apply to services "supplied in the exercise of governmental authority" (the "governmental authority exclusion"). This expression is defined to mean any service that "is supplied neither on a commercial basis nor in competition with one or more service suppliers." To the extent that health, education or social services fall within this exclusion, the GATS has no application to measures affecting them. In this section, the principles of treaty interpretation are used to develop some criteria for the application of this provision. In Section 6 of this study, these criteria are applied to health, education and social services as characterized above in Section 4 in order to ascertain the extent to which they are subject to the GATS.

Relatively few WTO dispute settlement cases have interpreted aspects of the services agreement;[233] none has dealt with the meaning of the governmental authority exclusion. Nevertheless, the Appellate Body and WTO panels, building on the work of GATT panels that rendered decisions in earlier cases, have developed a general approach to the interpretation of WTO obligations. In the cases dealing with the GATS to date, panels and the Appellate Body have applied this approach to interpreting the provisions of the Agreement. This same approach would be applied to the interpretation of the governmental authority exclusion if it were to come before a panel. Accordingly, this is the approach that is adopted in this study.

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[233] See above note 70.

Some may argue that an examination of the GATS solely from the point of view of how the obligations may be interpreted by a dispute settlement panel or the Appellate Body is unduly narrow, legalistic, and not reflective of the real impact of the agreement. Certainly it is true the GATS has effects beyond the impact of WTO determinations in dispute settlement cases. What governments think the governmental authority exclusion means will guide them in developing law and policy in areas affected by the GATS in a good faith effort to comply with their obligations.

Also, not all measures that may be inconsistent with the GATS will be the subject of a challenge through the dispute settlement process. Accordingly, in formulating a measure the GATS-consistency of which is uncertain, Canadian policy makers must take into account not only what a panel or the Appellate Body might decide if a challenge were brought but also the risk that another WTO Member would initiate a challenge, a calculus that requires a careful assessment of the political and commercial interests at stake, both domestic and foreign.

Nevertheless, this study's focus on the approach that a WTO dispute settlement panel would take may be justified on several bases. First, the only definitive interpretation of what obligations the GATS imposes on Canada in a particular context would be that adopted by a dispute settlement panel or the Appellate Body. In other words, government measures must always be made in the shadow of how a panel or the Appellate Body would respond if they were challenged. Second, any analysis that seeks to assess the practical impact of an obligation beyond what a panel or the Appellate Body might decide must be intimately tied to the specific political and economic circumstances surrounding a particular government measure. Such an approach is not feasible in a general study like this one.[234] Third, there is some analytical consistency in the manner in which dispute settlement panels and the Appellate Body go about their work, which allows for relatively reliable predictions regarding how they will interpret the provisions of WTO Agreements.

(b) General Approach to Interpretation

Pursuant to Article 3.2 of the WTO Dispute Settlement Understanding, the purpose of the dispute settlement system is "to clarify the existing provisions of [the WTO agreements] in accordance with customary rules of interpretation of public international law." The interpretive rules set out in the *Vienna Convention on the Law of Treaties* (*Vienna Convention*) are accepted as a codification of customary international law and the convention has been uniformly endorsed by WTO panels and the Appellate Body as the starting point for interpreting WTO agreement provisions.[235] Article 31(1) of the *Convention* requires, in part, that a treaty be interpreted

> in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose.

The *Vienna Convention* goes on to define the context as consisting of the text, its preamble and annexes as well as any

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[234] This is not to say that such an analysis would not be useful or important. For an example of such an analysis see the *CCPA Report on Health*, above note 111.

[235] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980, reprinted in 8 I.L.M. 679 (1969) [*Vienna Convention*]. Canada is a party to this treaty and it is accepted as a correct statement of customary international law by WTO dispute settlement panels. The WTO Appellate Body has accepted that the approach to interpreting WTO obligations is that embodied in the *Vienna Convention*: *US – Gasoline*, above note 51; *Japan – Taxes on Alcoholic Beverages* (*Complaints by the European Communities, Canada and the United States*) (1996), WTO Doc. WT/DS8, 10, 11/AB/R (Appellate Body Report), www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1995 (accessed June 3, 2003) [*Japan – Alcohol*]. See generally, M. Lennard, "Navigating by the Stars: Interpreting the WTO Agreements," (2002) 5 J. Int'l Econ. L. 17 [*Lennard*], at 17-18.

- agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and
- instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In the case of the GATS, the treaty consists of the *Agreement Establishing the World Trade Organization*, of which the GATS and all the other WTO agreements form an integral part.[236]

Together with the context, the *Vienna Convention* directs that the following be taken into account:

- any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application;[237] and
- any relevant rules of international law applicable in the relations between the parties.

In applying this approach in practice, WTO panels and the Appellate Body have focused on attempting to determine the ordinary meaning of the language used. Interpretation based on divining the subjective intention of the parties[238] or the true object and purpose of the treaty as a whole has been rejected.[239] The *Vienna Convention* itself establishes one exception to this rule: when it is demonstrated that the parties intended that a special meaning be given to a provision, that special meaning must be given. In the interests of certainty, the ordinary meaning of the language used may be determined as at the time that the treaty was concluded.[240] The Appellate Body has also recognized, however, that some obligations are inherently evolutionary and must be interpreted in light of the circumstances in existence at the time an issue arises. An evolutionary approach has been applied, for example, in determining the meaning of the exception from the general obligations of the GATT for measures designed to protect "exhaustible natural resources" set out in GATT Article XX.[241]

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[236] *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (Complaint by Pakistan)* (2001), WTO Doc. WT/DS192/AB/R (Appellate Body Report), online: WTO <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000> (accessed June 3, 2003).

[237] The references to subsequent agreements and practices have been interpreted as agreements and practices amongst all the Members of the WTO (*US – Tuna*, above note 58). Some commentators have suggested that this is not the correct interpretation: *e.g.*, P. Mavroidis, & D. Palmeter, "The WTO Legal System: Sources of Law," (1998) 92 Am. J. Int'l L. 398 [*Mavroidis & Palmeter*], at 410-412. Others agree with it: *e.g.*, Lennard, above note 235, at 34-35.

[238] The approach was rejected in *European Communities – Customs Classification of Certain Computer Equipment* (*Complaint by the United States*) (1998), WTO Doc. WT/DS62, 67, 68/AB/R (Appellate Body Report), http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996 (accessed November 25, 2003) [*EU – Computer Equipment*], discussed in P. Maki, "Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the DSU System," (2000)

In order to confirm the meaning resulting from this approach to interpretation or to determine the meaning if this approach leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, the *Vienna Convention* permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[242] Recently, the WTO published

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9 Minn. J. Global Trade 343 [*Maki*].

[239] This approach, which is sometimes referred to as a "teleological approach," was rejected by the Appellate Body in *Japan-Alcohol*, above note 235. In *US – Shrimp*, above note 59, the Appellate Body expressly suggests that there is some scope for such an approach, though the Appellate Body emphasized the importance of beginning with the text itself and divining the object and purpose from the words used. The approach actually applied in the case may be interpreted as consistent with the text-based approach mandated by the *Vienna Convention*, above note 235. See Lennard, above note 235, at 28. This view is not shared by all commentators: *e.g.*, J. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 Harvard Int'l L. J. 333, at 360.

[240] One of the identified purposes for this approach is to increase the certainty of WTO rules. See Lennard, *ibid.*, at 39.

[241] *US – Shrimp*, above note 59. This approach to interpretation is discussed in Lennard, *ibid.*, at 75-76. The GATT general exceptions are discussed above notes 50-59 and accompanying text.

[242] *Vienna Convention*, above note 235, Art. 32. Supplementary means of interpretation have often been referred to in WTO and GATT cases. See Lennard, *ibid.*, at 47.

the WTO Analytical Index, which may be looked to as a source of references to such supplementary means of interpretation.[243]

In the WTO system, prior decisions interpreting WTO obligations in dispute settlement proceedings are central to predicting how a provision will be interpreted. Decisions of panels and the Appellate Body are not binding on future panels or the Appellate Body. Nevertheless, in the interests of ensuring greater certainty and predictability regarding the effect of WTO obligations, the practice is to accord a high degree of deference to the analysis and conclusions employed in prior decisions.[244] In effect, panels follow each others' decisions and those of the Appellate Body and risk being overturned by the Appellate Body if they do not. The scope of Article I.3 has not, however, been considered in the small number of cases addressing provisions of the services agreement though, as noted above, some decisions have addressed other provisions of the GATS relevant to this study.[245]

Other sources of interpretation recognized in other settings have had little impact on WTO panels. Writings of legal scholars are rarely referred to.[246] While some commentators have suggested that writings of legal scholars are an appropriate supplementary source of interpretation,[247] there is no express basis in the *Vienna Convention* for relying on such writings.[248]

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[243] *WTO Analytical Index, Guide To WTO Law And Practice* (Geneva: WTO, 2003). Another relevant source may be *Uruguay Round Negotiating History*, above note 77. The GATT Analytical Index dealing with the negotiation of the original GATT Agreement has been relied on in dispute settlement cases.

[244] A.T.L. Chua, "Precedent and Principles of WTO Panel Jurisprudence" (1998) 16 Berkeley J. of Int'l L. 171; R. Bhala & D.A. Gantz, "WTO Case Law Review 2001" (2002) 19 Arizona J. Int'l & Comp. L. 456, at 498; and Mavroidis & Palmeter, above note 237, at 400. Article 3.2 of the DSU, above note 66, states that the central role of the dispute settlement system is "providing security and predictability to the multilateral trading system."

[245] See list of WTO cases considering GATS provisions, above note 70.

[246] Mavroidis and Palmeter, above note 237, at 407.

Statements by the WTO Secretariat, the Chair of the Council on Trade in Services and chairs of other organs of the WTO have been referred to by some commentators seeking to understand the meaning of particular GATS provisions, including Article I.3(b) and (c).[249] As a general rule, such statements are not authoritative from the point of view of a WTO dispute settlement panel or the Appellate Body: neither the Secretariat nor the chair of a WTO body is a "party" to the WTO, so their statements cannot be considered "subsequent practice" in the application of the treaty; nor, unlike WTO panels and the Appellate Body, do Secretariat officials or chairs of WTO organs have a mandate to interpret the GATS.[250] That being said, such statements may be considered supplementary means of interpretation in certain circumstances – for example, if the general rules of interpretation lead to an interpretation that is ambiguous, obscure or absurd. In the same vein, if such statements were found to reflect a subsequent agreement between or among the Members regarding the interpretation of the treaty or to show an intention of all the Members to give special meaning to a term at the time the GATS was entered into, the statements would be directly relevant to interpreting the pertinent GATS provisions.[251] No statement regarding GATS Article I.3 purports to reflect any such agreement or intention regarding the meaning of the governmental authority exclusion. Nevertheless, insofar as such statements shed light on possible meanings of the exclusion, or reflect Members' operative understanding of the agreement, they may be of practical significance.

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[247] *E.g.*, Mavroidis and Palmeter, *ibid.*, at 398-399, who suggest that all sources of law referred to in Art. 38 of the Statute of the International Court of Justice, including the statements of highly qualified publicists, may be referred to.

[248] This is the view of Lennard, above note 235, at 72-75.

[249] See, for example, Grieshaber-Otto & Sanger, above note 7, at 24-29; Grieshaber-Otto & Sinclair, above note 16, at 17-25; and Sanger, above note 5, at 81-86.

[250] Under Art. IX of the WTO Agreement, the WTO Ministerial Conference and the General Council, each of which is composed of representatives of all WTO Members, have the exclusive authority to adopt interpretations of the GATS. In relation to the interpretation of GATS, Art. IX.2 provides that the Conference and the Council shall exercise their authority on the basis of a recommendation from the Council for Trade in Services and that decisions to adopt an interpretation require approval by a three-fourths majority of Members. No interpretation of GATS has been adopted through this process.

Statements by Members themselves regarding the meaning of certain provisions have been held by dispute settlement panels to be relevant for interpreting a Member's obligations in limited circumstances. In *United States – Sections 301-310 of the Trade Act of 1974*, statements made in a panel proceeding by persons with authority to bind the state and intending to bind the state were held to be relevant.[252] It is clear, however, that, statements regarding the subjective interpretation of the treaty by a Member will not be relied on to replace a textual analysis.[253]

In this regard, one of the statements by Members that has been referred to by various commentators is a joint statement by the European Union, Hungary, Poland and the Slovak Republic that the governmental authority exclusion is "similar" to Article 55 of the Treaty of Rome, which creates an exception from some of the investment provisions of the treaty for "activities which in that State are connected, even occasionally, with the exercise of official authority."[254] This statement, however, is not a subsequent agreement between the Members of the WTO and, in any case, is of marginal relevance since the European Court of Justice has made clear that Article 55 is to be interpreted narrowly as an exception and, as discussed below, this is not the correct approach to interpreting Article I.3(b) and (c).[255]

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[251] M. Krajewski, *Public Services and the Scope of the General Agreement on Trade in Services* (Geneva: Center for International Environmental Law, 2001), at 15 [*Krajewski*]. Krajewski has addressed the same issues in "Public Services and Trade Liberalization: Mapping the Legal Framework" (2003) J. Int'l Econ. L. 341 [*Krajewski, Mapping*].

[252] *United States – Sections 301-310 of the Trade Act of 1974 (Complaint by the European Communities)* (2000), WTO Doc. WT/DS152/R (Panel Report), <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1998> (accessed June 3, 2003), at para. 7.121-7.126.

[253] In *EU - Computer Equipment*, above note 238, the Appellate Body refused to adopt an interpretation of "automatic data processing equipment" on which the UK had relied in its negotiations with the US, even in the face of US argument that the meaning adopted in negotiations had informed its expectations. The Appellate Body ruled that the interests of all Members in being able to rely on the text of an agreement meant that interpretation had to be grounded in the text alone. See Maki, above note 238, at 354-356 and Lennard, above note 235, at 72-3. Some language used by Members in their national schedules of commitments to describe limitations on their obligations in relation to public services provides no clear guidance regarding the meaning of the governmental authority exclusion but may be referred to because Members' schedules form an integral part of the GATS (GATS Art. XX.3). See Krajewski, Mapping, above note 251, at 354-5.

Regardless of their relevance to interpretation as a matter of law, statements from the WTO Secretariat, other WTO bodies and individual Members provide little useful guidance regarding how to approach the interpretation of GATS Article I.3(b) and (c). They are imprecise and conflicting or simply restate the provisions of the GATS.[256] The only conclusion one can draw from a review of these statements is that the governmental authority exclusion is susceptible to a range of possible interpretations. Differing views may reflect the fact that the Members of the WTO drafted this provision using broad language with a view to ensuring that it was capable of excluding diverse types of government programs from the application of the GATS. The absence of any challenge of a measure relating to health, education or social services under the dispute settlement procedures since GATS came into force on January 1, 1995 supports this perspective. As well, despite their differences, WTO Members have not called for clarification of the governmental authority exclusion.[257] Nevertheless, these statements also suggest a significant amount of uncertainty regarding the application of the governmental authority exclusion in particular circumstances.

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[254] Joint Communication from the European Union, Hungary, Poland and the Slovak Republic to the Committee on Regional Trade Agreements (WT/REG50/2/Add.3, 19 May 1999). The communication is referred to, for example, by Krajewski, above note 251, at 9: Grieshaber-Otto & Sinclair, above note 16, at 20, Grieshaber-Otto & Sanger, above note 7, at 28; and Government of British Columbia, Ministry of Employment and Investment, "GATS and Public Service Systems" (Victoria, B.C.: Queen's Printer, 2001) [*BC Discussion Paper*], at 6.

[255] The jurisprudence of the Court is referred to in the Communication.

[256] Krajewski reaches this conclusion based on a detailed review of statements by the Secretariat and Members (see Krajewski, above note 251, and Krajewski, Mapping, above note 251, at 347). See also Grieshaber-Otto & Sanger, above note 7, to similar effect discussing WTO and Canadian government statements.

One final general interpretive issue is whether to treat the governmental authority exclusion as an exception. As noted above, some dispute settlement panels have determined that the general exceptions in the GATT should be interpreted narrowly, and that the onus of proving that the government measure in question fits within an exception is on the Member whose measure is challenged.[258] Recently, the Appellate Body has questioned the correctness of applying a special interpretive rule requiring a narrow interpretation of exceptions.[259] Whatever the status of the interpretive rule that exceptions should be narrowly construed, it should have no application to the interpretation of this provision.[260] GATS I.3(b) is not an exception, but rather a provision that defines the scope of the Agreement's application. By placing the governmental authority exclusion in the definition of the scope of the GATS, the drafters have indicated that whether a measure is excluded under Article I.3(b) is a threshold question. As part of the scope provision, the governmental authority exclusion represents part of the fundamental bargain between the Members of the WTO regarding their obligations rather than a limitation on the obligations otherwise assumed. A measure must first be determined to be covered by the agreement before its consistency with the agreement may be considered.[261]

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[257] Others have called for clarification. *E.g.*, Krajewski, *ibid.*, and Grieshaber-Otto & Sanger, *ibid.*

[258] See above notes 50-59 and accompanying text.

[259] *Ibid.*, and above notes 52 and 53.

[260] This view is taken by J.R. Johnson, *How Will International Trade Agreements Affect Canadian Health* Care, Discussion Paper No. 22 (Ottawa: Commission on the Future of Health Care in Canada, 2002) [*Johnson*], among others. Some others have suggested that the provision is properly viewed as an exception and, as a result will be narrowly interpreted: *e.g.*, Grieshaber-Otto & Sinclair, above note 16; Sanger, above note 5. This view is also reported as having been expressed at a meeting of the Services Council (Council for Trade in Services, Report of Meeting held on 14 October 1998, S/C/M/30, at 8). Based on a variety of other factors, Krajewski concludes that the governmental authority exclusion will be interpreted narrowly (Krajewski, Mapping, above note 251, at 358).

(c) *What are the Specific Criteria for the Application of the Governmental Authority Exclusion?*

Introduction

Applying the interpretive approach developed above, what does the governmental authority exclusion mean in general terms? There is little material to work with in developing an understanding of this provision. Only a handful of commentators have attempted anything like a systematic exposition of it.[262] No WTO panel has considered its scope and there is little that can be gleaned from the preparatory work of GATS.[263] Consequently the following discussion develops what is primarily a textual analysis applying the approach developed in the preceding section. Because the provision has not been interpreted by a WTO panel, the interpretation suggested below is necessarily somewhat speculative.

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[261] In *Canada – AutoPact*, above note 70, the Appellate Body determined that the "structure and logic of Article I.1" requires that it must first be determined whether a given measure is covered by the GATS before its consistency with the agreement is considered (at paras. 151-152, 155). While this aspect of the decision related to Article I.1, arguably the same approach should be taken to the rest of Article I.

[262] Krajewski, above note 251; Krejewski, Mapping, above note 251; D. Luff, "Regulation of Health Services and International Trade Law", presented to OECD-World Bank Services Experts Meeting OECD, Paris, March 4-5, 2002 [*Luff*] (now published in Domestic Regulation and Services Trade Liberalization, A. Matoo & P. Sauvé, eds. (Washington: World Bank and Oxford, 2003) [*Luff, Domestic Regulation*]; and BC Government Discussion Paper, above note 254.

[263] See Krajewski, *ibid.*, at 16 and 17. In Krajewski, Mapping, *ibid.*, the author states that the WTO Director of the Trade in Services Division of the GATT Secretariat during the Uruguay Round negotiations, David Hartidge, has said that the language for the Governmental Authority Exclusion came from the European Union negotiators (at 363).

The structure of Article I.3(b) and (c) indicates that interpreting the provision involves applying two distinct tests:

- first, the service must not be supplied on a commercial basis; and
- second, the service must not be supplied in competition with one or more services suppliers.

Not on a Commercial Basis

Introduction

The precise criteria for determining when services are not supplied on a commercial basis are not self-evident. In the following sections, some possible criteria are developed. One conclusion of the analysis is that supplying a service on a not-for-profit basis is a useful indicator of the circumstances in which the service is not supplied on a commercial basis. Given the reference to "governmental" in the provision creating the governmental authority exclusion, it is argued that there must be some government involvement in the delivery of a service for it to fall within the exclusion.

Operating on a Not-For-Profit Basis

In most dictionaries, "commercial"[264] means pertaining to commerce or trade, which, in turn, means the exchange of goods or services for money.[265] It is arguably implicit in these definitions that services supplied on a commercial basis must be sold on a for-profit basis; some dictionary definitions expressly refer to the profit motive.[266] Profit for this purpose may be defined as ex-changing services for revenues that exceed the cost of producing and supplying the service.[267] Supplying a service for the purpose of making profits could be a requirement for the supply of a service to be "on a commercial basis." Actually making profits, however, cannot be held to be necessary. Periods during which profits were not made due to adverse economic conditions should not change the basic commercial nature of a service supplier's activities. So long as the supplier had a *bona fide* intention to make profits the supply would be commercial, even if profits were not made in fact. Sales of services below cost for the purpose of attracting customers could still be on a commercial basis if such sales were intended to increase profits in the longer term.[268] Such an interpretation leads to the somewhat unusual conclusion that the scope of the GATS would be defined by the intentions of service suppliers. Some commentators have rejected the notion that the scope of the governmental authority exclusion should depend on the subjective intention of suppliers.[269] However, a profit-making intention may be determined on an objective basis. In various domestic law contexts the existence of an

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[264] The Oxford English Dictionary, online: OED <www.oed.com> (date accessed May 12, 2003)[*OED Online*] defines commercial as "of, engaged in, bearing on, commerce; interested in financial return" and commerce means "exchange of merchandise or services…, buying and selling".

[265] See the definitions of 'commercial" and "commerce" in OED Online, *ibid.*, BLACK'S LAW DICTIONARY (7th ed), B.A. Garner (ed) (St. Paul: West, 1999)[*Black's*], and D. A. Dukelow, THE DICTIONARY OF CANADIAN LAW (3d ed), (Scarborough: Thomson, 2002)[*Dictionary of Canadian Law*]. Dictionary definitions are commonly referred to by dispute settlement panels in interpreting WTO Agreements (*e.g.*, *Korea – Beef*, above note 54).

[266] See the definitions of 'commercial" ("engaged in commerce, trading, or pertaining to commerce or trade; viewed as mere matter of business, looking

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toward financial profit") "commercial use" ("use in connection with a trade, business, profession, manufacture or venture for profit") and the definition of "commercial enterprise" ("sole proprietorship, partnership, co-operative or corporation having for its object the acquisition of gain") in THE CANADIAN LAW DICTIONARY, *ibid.* See also BC Discussion Paper, above note 254, at 6.

[267] There is no universally accepted accounting definition of profits. What is included in revenues and costs and the determination of whether profits are or are not being made will be complex in some situations. Where service suppliers receive state subsidies, for example, such subsidies would have the effect of reducing costs, thus increasing profits. The basic notion of profits suggested above is consistent with the definition of "profit" in the OED Online, above note 264, taxable income from a business for income tax purposes and net income for accounting purposes (see CICA, *CICA HANDBOOK* (Toronto: Canadian Institute of Chartered Accountants, 2003)[*CICA Handbook*].

[268] There is a vast literature on pricing activities, including the circumstances in which pricing below some measure of cost is rational in terms of being in pursuit of profits in the longer term. See generally, M. Trebilcock, R. Winter, R. Collins and E. Iacobucci, *THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY* (University of Toronto Press: Toronto, 2002), chapters 6 and 7.

[269] *E.g.*, Luff, above note 262, at 15.

intention to make profits is determined on an objective basis by the courts.[270] An assessment of whether an intention to make profits exists may be made by WTO dispute settlement panels in a similar way.[271] Supplying a service on a for-profit basis, as determined objectively, would be one workable criterion for assessing whether a service is delivered on a commercial basis.

It may not be possible to argue on the basis of dictionary definitions alone that making profits or an intention to make profits is necessary to a finding that a service is being provided on a commercial basis.[272] Not all definitions of commercial refer to profit-making. Nevertheless, in most cases it would be difficult to conclude that the supply of a service on a not-for-profit basis would nevertheless be on a commercial basis. A supplier is organized to supply services on a not-for-profit basis where the objective of the supplier is not to generate private financial benefits for the corporate or individual owners or other contributors of resources involved in the supply of the service by earning revenues exceeding the related costs incurred, but instead is to promote or achieve some other purpose.[273] A not-for-profit purpose would include, for example, the advancement of education, the alleviation of poverty or suffering or the promotion of some other community benefit.[274] Such a supplier would not be providing a service on a commercial basis where it operates exclusively for such a not-for-profit purpose. In order to assess whether these criteria were met in relation to the operations of a particular service supplier, it would be necessary to assess how the organization operates in practice. The supplier would have to raise revenues only as necessary to cover its costs of delivering its not-for-profit services.

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[270] Section 2 of the Ontario *Partnerships Act*, R.S.O. 1990, c. P.5, for instance, defines a partnership as any "relation between two or more people with a view to a profit." The courts are regularly required to decide whether a business is conducted with a view to a profit. See, for example, *Sprire Freezers Ltd.* v. *The Queen* (2001), 196 D.L.R. (4th) 210 (S.C.C.).

[271] In Krajewski, Mapping, above note 251, the author suggests that the test is whether there is an "aim" to make profits (at 351). Some other commentators have suggested that only for-profit activities are caught by the GATS (*e.g.*, Sauvé, above note 179, at 3). David Hartridge, when he was Director of Services Trade with the WTO Secretariat suggested that the "not-on-a-commercial-basis" test should be interpreted as being equivalent to "sans but lucratif" (D. Hartridge, European Union Services Conference on GATS 2000, 27 November 2000). The GATS does not distinguish expressly between services provided on a not-for-profit and those on a for-profit basis. "Juridical person" is defined as "any legal entity duly constituted....whether for profit or otherwise..." (GATS Art. XXVII(l)).

[272] This is the conclusion reached by Krajewski, above note 252, at 10, who suggests that it will depend on the circumstances of each case, and Luff, above note 262, at 16-17.

[273] This interpretation is consistent with the definition of non-profit organizations used by the Canadian Institute of Chartered Accountants (see

In order to determine the nature of the service provision, it may be helpful to examine the constitutional documents of the organization to determine if they require that the organization is to deliver its services for a purpose other than profit-making. It is also possible that a for-profit supplier could supply a particular service on a not-for-profit basis and that this service would be supplied not on a commercial basis.[275] More typically, however, not-for-profit services will be supplied by organizations established to operate on a not-for-profit basis.

If, in a given period, a not-for-profit organization earned revenue in excess of its expenditures, arguably this should not affect the non-commercial basis of its operations unless such

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CICA HANDBOOK, above note 267, section 4400.02) and the criteria applied by the Canada Revenue Agency to determine whether an entity is a non-profit organization for the purposes of the *Income Tax Act* (Interpretation Bulletin IT-496R *Non-Profit Organizations*, 2001)[*CRA Bulletin on Non-Profits*].

[274] See the discussion of English and Canadian case law accepting such purposes as being charitable in nature in D. J. Bourgeois, *THE LAW OF CHARITABLE AND NOT-FOR-PROFIT ORGANIZATIONS* (3d ed.)(Toronto: Butterworths, 2002)[*Bourgeois*], at 9-29.

[275] Krajewski suggests this possibility (Krajewski, Mapping, above note 251, at 351). Often, however, such distinct charitable activities will be carried out through a legally separate charity. The accommodation provided at Ronald MacDonald houses to parents of seriously ill children receiving hospital treatment nearby, for example, is provided not by the for-profit MacDonald's corporation, but by the not-for-profit Ronald MacDonald House Charities. Another situation in which a for-profit service provider might supply a service on a not-for-profit basis would be a donation of services that a service provider otherwise provides on a for-profit basis to a charity. Arguably this would not be a distinct service supplied on a non-commercial basis.

surpluses are regularly earned and are accumulated from year to year in amounts in excess of the organization's reasonable needs.[276] What is "reasonable" would be a question to be determined on the facts of each case, based on such factors as future anticipated expenditures and the need to maintain a reserve against the risk of funding shortfalls.

Presumably, an organization otherwise meeting these criteria would not be considered to be supplying its services on a commercial basis only because it paid reasonable compensation in the form of salaries, wages or fees to those working on its behalf supplying the service on a not-for-profit basis. Otherwise only operations staffed solely by volunteers would fall within the exclusion.

In applying this not-for-profit criterion, the fact that user fees are charged for a service, on its own, would not be indicative of whether the service is being supplied on a commercial basis. A service would be supplied on a commercial basis where user fees are intended to cover more than costs. A service offer on this basis would be offered on a for-profit basis. On the other hand, if user fees were less than the cost of the service, this would be some evidence that the service was not being supplied on a commercial basis. Further enquiry would be necessary to determine if the supplier was nevertheless providing the service on a for-profit basis, taking into account other sources of funding.

If a not-for-profit organization carries on multiple activities, including some with a view to earning revenues in excess of costs, does this mean that it is operating on a commercial basis? One might argue that, so long as the for-profit activity is related to the fulfillment of the organization's not-for-profit purpose and the surplus revenues are not used to benefit any person but are devoted to fulfillment of the not-for-profit purpose, all the services of the organization should be considered to be supplied on a non-commercial basis. For example, a not-for-profit hospital may operate a parking lot for patients and visitors at prices that exceed the costs of running the lot. Nevertheless, so long as the funds raised were used exclusively to support the health services offered by the hospital, it could be argued that this activity was part of a non-commercial operation.[277] If the for-profit activities became a substantial part of the organization's activities, such that surpluses were earned on a regular basis, then the supplier's services might be considered to be operating on a commercial basis. This approach is consistent with how the Canada Revenue Agency determines if an organization may be considered a not-for-profit charitable organization.[278]

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[276] CRA Bulletin on Non-Profits, above note 273. See the similar approach in the *CICA HANDBOOK*, above note 267, s. 4480.

An alternative approach would be to treat the for-profit activities as a separate service supplied on a commercial basis. Since GATS Article I.3(c) refers to "service" supplied not on a commercial basis, rather than "service supplier, this alternative approach is likely preferable. Services supplied by a not-for-profit organization at prices set to no more than cover costs would not be supplied on a commercial basis, whereas other services supplied by the same organization at prices exceeding costs would be supplied on a commercial basis.

Government Involvement in Service Delivery

The structure of the governmental authority exclusion is unusual. The expression "services supplied in the exercise of governmental authority" in Article I.3(b) "means" any service meeting the two tests noted above. Ordinarily, the use of the word "means" indicates that the expression is exhaustively defined by the words that follow.[279] On this basis, the words "in the exercise of governmental authority" are only relevant as part of the context for interpreting the requirements of the exclusion.[280] There is no independent requirement to determine that a service is in the exercise of governmental authority. But in order to give effect to the words used in Article I.3(b), some meaning must be given to "in the exercise of governmental authority."[281] One way to do this is to treat government involvement in the delivery of a service as a factor in determining whether the service is being supplied on other than a commercial basis. A high degree of government control over the delivery of the service would suggest that the service is not being offered for a private purpose but rather in fulfillment of a government purpose and, for this reason, should not be considered to be supplied on a commercial basis.[282]

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[277] The Federal Court of Appeal came to the conclusion that the operation of a parking lot on a for-profit basis by a hospital did not deprive the hospital of its status as a charitable organization in *Alberta Institute on Mental Retardation* v. *Canada* [1987] 3 F.C. 286. (C.A.).

[278] This approach is followed by the Canada Revenue Agency to determine whether an entity is a non-profit organization for the purposes of the *Income Tax Act* (CRA Bulletin on Non-Profits, above note 273). See also, Bourgeois, above note 274, at 32-35.

[279] This rule is accepted in Canadian statutory interpretation (see, for example, R. Sullivan, STATUTORY INTERPRETATION (Toronto: Irwin Law, 1997), at 80) and would likely be applied in interpreting GATS.

What kind of government involvement in service delivery would be relevant to deciding whether a service is being offered on a commercial basis? Dictionary definitions of "governmental" indicate that it refers to the entire executive and administrative apparatus of the state regardless of the level of government or the subject matter it deals with.[283] The Oxford English Dictionary defines "authority" as the "the power or right to enforce obedience."[284] If these meanings were adopted literally for the purposes of defining what services are supplied on other than a commercial basis, it could sweep in all services supplied in circumstances in which the government (broadly conceived) has the power to determine who is eligible to provide services and to set the standards to be met by service suppliers. Such an expansive interpretation would include services supplied in all sectors where permission to operate is subject to a licensing regime. It must be considered absurd to suggest that the intention was to expand the definition of not on a commercial basis to all services subject to government licensing or other forms of standards regulation.[285] Such a broad interpretation would encompass a high proportion of all services activities.

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[280] Krajewski endorses this view, above note 251, at 13.

[281] WTO panels have held that the WTO agreements are to be interpreted so as to give effect to their provisions. See Lennard, above note 235, at 58. In his analysis of Article I.3, Luff (above note 262, at 15-18) simply ignores these words in examining the "not-on-a-commercial-basis" and "not-in-competition" requirements. In most other contexts, it is not necessary to attach any meaning to words used that are themselves exhaustively defined because the legislative purpose in using the words is simply to create a defined term to be used in other places in the instrument as a shorthand reference to the full definition. In the GATS, however, the words "in the exercise of governmental authority" are nowhere used in the agreement, except in the Annex on Financial Services where they are separately defined as discussed below. Consequently, if the words are to have any effect at all, they must inform the interpretation of the tests in Art. I.3(c).

[282] Krajewski, Mapping, above note 251, at 353 and 363.

[283] DICTIONARY OF CANADIAN LAW, above note 265, "government" "in its generic sense – meaning the whole of the governmental apparatus of the state; the executive and administrative branch"; BLACK'S, above note 265, "government" refers "collectively to the political organs of the country regardless of the function or level and regardless of the subject matter that they deal with."

[284] OED Online, above note 264.

The reference to "exercise" in Article I.3(b) suggests a narrower meaning. For a service to be supplied in the exercise of governmental authority it must be delivered by government or on its behalf.[286] Governmental authority in this sense may extend to actions of both state and private actors carried out under instructions of the state or under its control or direction, even in the absence of an express legal delegation.[287] In assessing whether state authority is being exercised, one must have regard to the degree of state control over the service supplier, including control over budget, participation in management and control over both the nature of the service supplied and the manner in which it is delivered.

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[285] As well, if this were intended, clearer words could have been used, such as "supplied under government authority."

[286] This interpretation is more consistent with other definitions of "authority" in BLACK'S, above note 265, at 127-129, "1.) The right or permission to act legally on another's behalf; the power delegated by a principal or agent; 2.) Governmental power or jurisdiction; 3.) A governmental agency or corporation that administers a public enterprise," and DICTIONARY OF CANADIAN LAW, above note 265: "a person authorized to exercise a statutory power; a body given powers by a statute to oversee or carry out a government function."

[287] See definitions cited *ibid.* Such an understanding is also consistent with Canadian domestic law. In a number of cases, private entities have been found to be exercising state authority even in the absence of express delegation. See, for example, *Dale* v. *Manitoba* (1997) 147 D.L.R. (4th) 605 (Man. C.A.) finding that a university was acting as an agent of the government in administering a student assistance program.

It is in this sense that "power or right to enforce obedience," as referred to in the Oxford English Dictionary should be understood.

In short, one aspect of whether a service is found to be supplied on a non-commercial basis may be whether the state is significantly involved in the delivery of the service. Applying this aspect of the "not-on-a-commercial-basis" requirement, services supplied for a purely private not-for-profit purpose without state involvement, such as providing recreational or social activities to members of a club, should not be within the exclusion. The services of many private charitable and other organizations with no connection to government would also be outside the exclusion and subject to GATS.

Summary

One may argue that a service can be found to be offered not on a commercial basis so long as it is supplied on a not-for-profit basis and where the state is significantly involved in the delivery of the service. The essence of the not-for-profit aspect of this test is that the supplier supplies the service exclusively with a view to fulfilling a purpose other than making profits by supplying services at prices which will generate revenues no greater than costs. Consistent with this approach where a not-for-profit organization supplies some services at prices exceeding costs, it is operating on a commercial basis, though, in some situations, the commercial service may be distinguishable from other services that it supplies not on a commercial basis.

To give effect to the words "in the exercise of governmental authority" as part of the context for interpreting not "on a commercial basis," a significant level of government involvement in the delivery of the service may be required. This may consist of extensive state control over the nature of the service supplied and the manner in which the service is delivered, including control over budget and management decision making, such that it is clear that the service is being delivered to fulfill a government purpose.[288]

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[288] Setting the boundary between what is a purely state function and what is a commercial function has proven difficult in other circumstances. The International Law Commission in 1991 submitted to the UN General Assembly Draft Articles

One may imagine that whether a service is offered on a commercial basis could be determined by reference to other market place indicia, such as the ability of the supplier to adjust supply to meet demand, for the supplier to be subject to the risk of loss, and for the supplier's management decision-making to be based on maximizing expected returns in light of the risks associated with those returns.[289] However, only the identified factors, for-profit delivery and government involvement, are suggested by the ordinary meaning of the words themselves. In practice, the factors identified would capture some of other these indicia in any event.

Not in Competition

Introduction

The second requirement for the application of the governmental authority exclusion is that a service must not be supplied "in

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on Jurisdictional Immunities of States and Their Properties, that provided, among other things, for an exclusion from the scope of state immunity for "commercial transactions" (Art. 1(c)). This term was to be interpreted in accordance with the following rule (Art. 2): "In determining whether a contract or transaction is a "commercial transaction" under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction." (Text adopted by the Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.) The report (UN Doc. A/46/10), which also contains commentaries on the draft articles, was published in the Yearbook of the International Law Commission, 1991, vol. II(2). One of the outstanding issues was what should be the criteria for determining whether a transaction was commercial. In a review of this provision beginning in 1999, a working group established by the ILC suggested that, in light of the diversity in international practice with respect to determining whether a government action is commercial, the interpretive direction in Article 2 should be deleted (International Law Commission, *Report of the Working Group on Jurisdictional Immunities of States and their Property, 1999* - U.N. Doc. A/CN.4/L.576 (ILC Report, A/54/10, 1999, annex)).

[289] These sorts of criteria were rejected by Luff, above note 262, at 15-16. They derive from financial models for business decision making. See, *e.g.*, J.J. Hampton, *Modern Financial Theory: Perfect and Imperfect Markets* (Reston: Reston Publishing, 1982), at 3-16.

competition with one or more services suppliers." Where services are supplied exclusively by government and competition by private suppliers is precluded by law, the service would be within this aspect of the governmental authority exclusion.[290] Similarly, where private supply is permitted, but government action or the conditions in which the government permits private suppliers to operate mean that there can be no competition among them in any sense, then the exclusion would apply. This could occur, for example, any time a service supplier is granted a state monopoly on the supply of a service to consumers within a particular geographic area.[291] To go beyond these relatively clear examples, one must answer the difficult question of what is meant by competition.

Defining Competition

Competition is a complex notion in the abstract. A review of dictionary definitions of "competition" suggests that for competition to exist customers must be able to choose the supplier whose services they want to acquire and service suppliers must seek to attract customers from other suppliers.[292] Competition in this sense could occur even where the state sets the price of services supplied and pays directly for all services supplied so long as the income of each service supplier depends upon the number of customers who acquire their services and the service supplier could and did seek to attract customers by adjusting non-price determinants of demand, such as quality.[293] In these circumstances, rivalrous behaviour would be economically rational.[294] On the other hand, if payment to service suppliers were exclusively from the state and the size of the payment did not depend on the number of customers a supplier attracted, then there would be no reason for competition among suppliers for customers. It is also true that competition may be precluded in practice, such as where the capacity of service suppliers to supply a market is far outstripped by demand. Imagine a town with just two doctors each of whom has more patients who desire their services than they can treat, and patients are precluded from paying for the doctors' services under the provincial health plan.[295] In these circumstances, there could be no effective competition. Competition would still exist where suppliers of a service submit competing bids to a government body for the right to receive a fee for providing services to individuals, such as is the case with home care in Ontario. Presumably, rivalry at the bidding stage would be sufficient to generate competition even if the winner were granted the exclusive right to provide the service in a particular area.

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[290] The advent of new technologies may result in services becoming capable of being supplied in competition with government in the future that are impractical to supply today in this manner.

[291] An example of this type of monopoly in Canada would be cable television operators. Of course, because the services of cable operators are clearly supplied on a commercial basis, their services are not within the governmental authority exclusion and would be subject to the GATS.

[292] See the definition of competition in the OED online, above note 264. See also definitions cited in BC Discussion Paper, above note 254. A WTO Panel in *Mexico – Telecommunications*, above note 37, recently adopted the following definition of competition for the purposes of interpreting Mexico's obligations in telecommunications services: "rivalry in the market, striving for custom between those who have the same commodities to dispose of" (from THE SHORTER OXFORD ENGLISH DICTIONARY, 3d ed (Oxford: Clarendon Press, 1990)).

For rivalry to exist, even in the competitive bidding scenario described above, the service suppliers must, in some sense, be substitutes for each other from the customer's point of view.[296] In economic parlance, there must be a non-zero (and in practical terms rather high) elasticity of substitution between them.[297]

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[293] Luff, above note 262, at 17.

[294] One can imagine rivalrous behaviour that would not conform to any economic model of competition, such as several hospitals seeking to have the exclusive right to provide a service where no economic benefits flow to the successful hospital. Such non-economic rivalrous behaviour would not likely be sufficient to bring the hospitals into competition. This point is discussed below note 344 and accompanying text.

[295] Luff, above note 262, at 12.

[296] This is the foundation of the analysis of competitive effects under domestic competition law in most jurisdictions. See for example the conceptual framework for analyzing the competitive effects of mergers in Canada (Competition Bureau, *Merger Enforcement Guidelines*, 1991, Part 3 Market Definition)[*Competition Bureau Merger Enforcement Guidelines*]. The same basic approach is taken in the United States and Europe. Demand substitution was accepted as the appropriate way to determine the relevant market in *Mexico – Telecommunications*, above note 37, at paras. 7.149-7.152.

One possible starting point for thinking about when services should be considered substitutes is whether they are "like services." In the context of the national treatment and MFN obligations, the issue of whether there has been discrimination against foreign services from a particular country turns, in part, on whether the foreign services allegedly discriminated against are "like" the services benefiting from the alleged discrimination.[298] One must be very cautious about importing the concept of like services into the interpretation of the notion of competition in Article I.3(c). As discussed below, the concept of likeness may be both broader and narrower than competition in particular circumstances.[299] Nevertheless, since the essence of the national treatment and MFN tests has been found to be the protection of equality of competitive opportunities for suppliers, there is some logical basis for seeking guidance on the question of whether services are substitutes from an analysis of like services.[300]

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[297] This expression was used by the Appellate Body in *Korea – Taxes on Alcoholic Beverages (Complaint by European Communities and the United States)*(1998), WTO Doc. WT/DS75/AB/R, WT/DS84/AB/Rwww.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm# 1999 (accessed May 5, 2004), at paras. 120-134 in interpreting the phrase "directly competitive and substitutable" in GATT *Ad*Art. III.2 (at para. 6.22).

[298] These concepts are well developed in relation to goods. The few cases decided so far suggest that the interpretation of like services will be similar to the interpretation of like goods. See Verhoosel, above note 43, at 33-34.

[299] Some commentators have suggested that the concept of competition is broader than the existence of suppliers of like services (*e.g.*, Grieshaber-Otto & Sanger, above note 7, at 85). As discussed below, it may also be narrower in particular circumstances.

[300] WTO cases considering likeness for the purposes of the national treatment obligation in the GATT have described it as "fundamentally a determination about the nature and the extent of the competitive relationship between and among products" (*EU – Asbestos*, above note 55, at paras. 99, 103). See similarly *US – Section 337*, above note 51. This characterization is adopted in the services context by Trachtman in J. Trachtman, "Lessons from the GATS for Existing Rules on Domestic Regulation," in *DOMESTIC REGULATION AND SERVICES TRADE*, A. Mattoo and P. Sauvé (eds) (Washington: World Bank and Oxford, 2003), at 61. It is also the approach suggested by the WTO

Unfortunately, few WTO cases have dealt with the issue of when services are "like." Likeness of goods, however, has been the subject of a large body of dispute settlement cases under the GATT and the WTO. Panels have made clear that likeness of goods is to be examined on a case-by-case basis. Panels have used the following four factors as a framework for analyzing likeness:

- the products' end-uses in a given market;
- consumers' tastes and habits, which vary from country to country;
- the properties of the product, including their nature and quality; and
- the products' tariff classification.[301]

The services classification in the WTO Secretariat's Services Sectoral Classification List,[302] which was used in the preparation of national schedules of commitments, is not sufficiently refined to be a useful analogue to the fourth factor but guidance may be taken from the much more detailed classification system in the United Nations Provisional Central Product Classification (*CPC*) system which is referred to in the sched-

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Secretariat in its (Note on Health and Social Services, above note 216, at 11). The national treatment obligation in the GATS is expressly defined as requiring that Members' measures not modify "the conditions of competition in favour of services or service suppliers of the other Member compared to like services or service suppliers of any other Member" (Art. XVII.3).

[301] These criteria were originally suggested in GATT, Report of the Working Party on *Border Tax Adjustments*, GATT Doc. L/3464, BISD 18S/97 (1970) at para. 18); applied in *Japan - Customs Duties, Taxes and Labeling on Imported Wines and Alcoholic Beverages* (1987) GATT Doc. L/6216, BISD 34S/83), <http://www.wto.org/english/tratop_e/dispu_e/87beverg.wpf> (date accessed November 26, 2003) and other cases cited by Verhoosel, above note 43, at 24. The so-called "aim and effects" test adopted by some GATT panels in making the likeness determination permitted them to take into account the regulatory objective sought to be achieved by a measure challenged as discriminatory. This approach was based on the particular language of GATT Art. III.1 which provided that measures should not be "applied so as to afford protection to domestic production." This approach has now been rejected by the Appellate Body (*Japan – Alcohol*, above note 235, *EU – Bananas*, above note 21, *EU – Asbestos*, *ibid.*). As well, the specific language in GATT Article III that panels relied on in developing the "aim and effects test" does not appear in GATS Arts. II or XVII.

[302] W/120, above note 38.

ules of most WTO Members, including Canada.[303] Finding that services are in the same CPC classification is one factor that may suggest that they are like. Services may, however, fall into the same CPC classification and still be quite different and, more significantly, not substitutes in the marketplace. For example, "Other education services" is a category in the CPC which is not further defined.[304] Services as different as speed reading courses and driving schools, which obviously are not substitutes, may both fall within this category.

The other factors used by WTO panels to determine if goods are like may be transported in a fairly straightforward way to comparisons of services. Services supplied by different suppliers may be considered to be like where they have the same end uses, are comparable in their nature and quality and are considered substitutes by customers. The application of such factors will not always lead to clear results, however. Even in the goods area, it has been acknowledged by the Appellate Body that determinations of likeness always involve an element of discretionary judgment.[305]

The Appellate Body's recent decision in the *Asbestos* case addressed how to determine whether goods are "like." In that case, the Appellate Body indicated that the health risk associated with a product such as asbestos might be relevant to deciding that it is not like another product that performs similar functions but poses lower risks. While the Appellate Body was clear that health risks were not an independent factor in evaluating likeness, a consideration of health risks was relevant to an assessment of the product's physical properties and consumer preferences relating to the product.[306] This case makes clear that there are a broad range of circumstances in which similar goods may be found not to be "like." A comparison of services with a view to determining if they are supplied in competition similarly would have to take into account all their attributes in assessing whether the services are close substitutes.

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[303] Provisional CPC, above note 38.

[304] Provisional CPC, *ibid.*, Class 9290.

[305] *Japan – Alcohol*, above note 235.

[306] *EU – Asbestos*, above note 55, at para. 113.

Nevertheless, while WTO panels have frequently applied concepts developed in one WTO context to another, it would be inappropriate simply to conflate the question of whether services suppliers are in competition for the purposes of the governmental authority exclusion and the question of whether suppliers are supplying like services based on the case law dealing with like goods. If the drafters had intended the test to be the same as the well known tests related to MFN and national treatment, they could easily have said so.

Also, the application of the like goods/like services analysis is not exhaustive of the circumstances which must be considered to determine if some services are supplied in competition with others. Services may be in competition even if they are not like.[307] In health care, for example, drug treatment and surgery used to treat the same medical condition may not be like but may nevertheless be in competition in the sense that they may be economic substitutes for each other if they promise the same benefits. Perhaps more important, services may be functionally indistinguishable and possibly even "like" applying the like goods criteria but nevertheless not be in competition. Services of public and private schools may be like but not be in competition. This example raises an important question for the purposes of this study: whether government services will be considered to be in competition with services supplied by private sector suppliers in the areas of health, education and social services? The answer will depend on an analysis of the specific contexts in which the suppliers operate. In Section 6 of this study we address the extent to which competition exists between government and private suppliers in the health, education and social services sectors.

Finally, the manner in which services are produced and delivered will often play a role in determining when services are in competition. In part, this is because some services may be supplied by a foreign service supplier who never enters the importing jurisdiction. Legal services provided over the telephone to a client in Canada by an American-based lawyer, computer support delivered over the Internet by a software company in the United States to a customer in Canada, and education services provided abroad to a Canadian student are all examples. Services supplied by Canadian service suppliers may sometimes be in competition with these foreign service suppliers who never set foot in Canada. Whether these foreign services supplied abroad or from abroad are in fact in competition with Canadian service suppliers who provide similar services on a face-to-face basis, or otherwise, in Canada will depend on an analysis of the competitive dynamic of the relevant market, including consumer preferences.[308] Consumers may view services delivered remotely as substitutes for the same services delivered in-person. Just because services are provided though a different mode of delivery does not mean that they are not in competition.[309] Equally, consumers may not view remote services as substitutes for services supplied locally and in person. In order to determine whether the governmental authority exclusion applies, it is not necessary to decide if the service suppliers or their services are similar, only that services are in competition. In each case, whether competition exists will be highly dependent on the facts.

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[307] Krajewski suggests that bus and train services may not be like but may nevertheless be in competition (Krajewski, Mapping, above note 251, at 352).

Special One-way Meaning of Competition in Governmental Authority Exclusion

For the purposes of the governmental authority exclusion, competition could be interpreted to have a particular meaning. To fall within the exclusion, the service must not be supplied "in competition with one or more services suppliers." This could mean that a service supplier must not operate with a view to competing with others for the supplier's service to fall within the exclusion. So, for example, where a supplier supplies a service pursuant to an obligation to provide services to all eligible consumers and not because it seeks to increase its revenues by attracting more consumers, such as is the case with public schools, the service would not be supplied in competition with one or more service suppliers. Under this interpretation, it would be irrelevant if there were other suppliers, such as for-profit private schools, who compete for students and the revenues they represent with each other and with public schools. For the services of public schools to be not in competition for the purposes of the governmental authority exclusion, all that would matter is whether the public schools themselves engage in competition.

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[308] This kind of exercise in defining the geographic market is what the Canadian Competition Bureau engages in when it tries to determine the impact of a merger and other activities on competition. See the *Competition Bureau Merger Enforcement Guidelines*, above note 296, Part 3, Market Definition.

[309] Sometimes this characteristic of services is described as "modal neutrality." Modal neutrality was endorsed in *Canada – AutoPact*, above note 70, and by the Council on Trade in Services (S/C/8 1999). The implications of modal neutrality and technological change are discussed in W. J. Drake & K. Nicolaïdis, "Global Electronic Commerce and GATS: The Millennium Round and Beyond," in *GATS 2000*, above note 65, at 420-421. See also Sanger, above note 5, at 56.

It is certainly possible that such a "one-way" conception of the meaning of competition may not be accepted by a dispute settlement panel.[310] The language may be found to be sufficiently elastic to refer to any situation in which some suppliers of a service are competing. Nevertheless, a close reading of the text suggests that this provision could be interpreted as extending the exclusion to all suppliers who do not, themselves, engage in competition.[311] Indeed, if it were not interpreted in this way, the scope of the exclusion would be quite narrow. In all service sectors in which private sector competition was allowed, the exclusion would not be available to any service supplied by the state with which the private sector suppliers competed. As discussed in Section 7 of this study, this would mean that even public school services would be subject to the agreement. A WTO panel or the Appellate Body may be reluctant to adopt an interpretation of the governmental authority exclusion under which the scope of the GATS would extend this far.

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[310] Krajewski appears to ignore this interpretation (Krajewski, above note 251, at 12-13).

[311] This one-way interpretation of the "not-in-competition" requirement was endorsed by David Hartridge, former Director of the Services Trade Division of the WTO Secretariat, in a letter to Mike Waghorne, Public Services International, 31 May 2000.

Summary

Determining whether the services of a particular services supplier are supplied in competition with other services suppliers for the purposes of GATS Article I.3(c) depends on an assessment of whether the services supplied by that supplier are substitutes for those of the other suppliers, in some sense, and whether the conditions of the market are such that customers are able to choose which services to buy and suppliers can and do seek to attract the same customers as the other service suppliers. Circumstances must be such that competition is economically rational as well as legally and practically possible.

It remains to be seen how WTO panels and the Appellate Body will analyze these basic requirements. With respect to substitutes, it is possible that guidance may be taken from the criteria developed in GATT and WTO cases on like goods to compare services. In considering whether competition exists, however, it is likely that a wider array of factors will be relevant to determining whether services are in competition. As well, the language of Article I.3(c) suggests that competition could have a "one-way" meaning. Under this interpretation, it is only competition by a particular supplier that will take the service it supplies outside the exclusion. If a supplier is operating under a mandate to provide services to all and not to increase its revenues by attracting more consumers, then its services would be within the exclusion. It does not matter that other suppliers of the same service may compete with the supplier or with each other.

Other Elements of the Context—The Preamble to the GATS

The *Vienna Convention* requires that treaty provisions be interpreted in their context.[312] The context in which GATS Article I.3(b) is found includes the preamble to the agreement. Many proponents of the GATS have noted that the preamble expressly acknowledges the "right of Members to regulate" and the need to give "respect to national policy objectives" arguing that this should encourage WTO panels to defer to a Member's decision to adopt measures in the areas of health, education and social services.[313] As well, some have argued that, in recent years, the Appellate Body has demonstrated greater deference to state sovereignty. Some commentators have even suggested that deference to state sovereignty should be elevated to a general principle of WTO treaty interpretation, though this view is not widely shared.[314]

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[312] Preambles have been held to be important elements of the context for the purposes of interpretation in WTO panel and Appellate decisions. For example, the Appellate Body in *US – Shrimp*, above note 59, held that the preamble may provide "color, texture and shading to the rights and obligations of Members" under the provisions of the GATT (at para. 153).

In according weight to this aspect of the context, however, one must be mindful of the other elements of the preamble, including the commitment of the Members to the "early achievement of progressively higher levels of liberalization of trade in services" and the statement that GATS is intended "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization."

The various elements of the preamble taken together suggest that interpretation should not defer to a Member's right to regulate where national regulation threatens the attainment of trade liberalization and the expansion of services trade. Equally, interpretation should not imperil a Member's right to regulate in the interests of promoting trade liberalization. This dual nature of the preamble was recognized by WTO Members in the *Guidelines and Procedures for the Negotiations on Trade in Services* adopted by the Council on Trade in Services in 2001.[315]

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[313] *E.g.*, Sauvé, above note 179, at 16-17; R. Adlung & A. Carzaniga, "Health Services under the General Agreement on Trade in Services" (2001) 79 *Bulletin of the World Health Organization* 352, at 355. The full text of the preamble is set out in Appendix I to this study.

[314] See Lennard, above note 235, at 65. The possible application of such a principle in the context of interpreting Art. I.3 is discussed in Krajewski, above note 251, at 18-19. See generally, M. G. Bloche, "WTO Deference to National Health Policy: Toward an Interpretive Principle" (2002) 5 J. Int'l Econ. L. 821.

[315] Adopted by the Special Session of the Council for Trade in Services on March 28, 2001 (S/L/93), para. 1.

Interpreting the GATS with a view to promoting the liberalization of trade is not fundamentally at odds with an interpretive mandate to respect Members' freedom to regulate. Market liberalization and regulation are not inherently incompatible objectives, though conflicts may arise in some cases. What is important is that the preamble does not prioritize one objective over the other. Provisions like the governmental authority exclusion should not be interpreted so as to restrict the right to regulate, even in the interests of promoting trade liberalization. The preamble suggests that where the issue before a panel is whether the governmental authority exclusion should be interpreted as carving a particular measure out of the agreement and the measure is inconsistent with trade liberalization, the panel should give equal weight to both the right to regulate and the objective of trade liberalization.

The impact of this somewhat ambivalent message from the preamble must be tempered by the recognition that the effect of preambular statements is limited in any case. It is the text of the obligations that matters though the preamble is part of the context for interpretation that the *Vienna Convention* requires to be taken into account in determining the ordinary meaning of the text. The preamble will be most significant where the text is equivocal or inconclusive. In light of the broad array of possible meanings for the governmental authority exclusion, however, substantial reliance may be placed on the preamble by WTO panels in future cases.[316]

Special Provisions Relating to Financial Services

As discussed in Section 2 of this study, the GATS contains an Annex dealing specifically with financial services. The Annex forms an integral part of the GATS. In addition to providing a definition of financial services and addressing several issues relating to the application of the GATS to domestic regulation in that area, the Annex contains a different definition of the governmental authority exclusion.

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[316] The Appellate Body in *US – Shrimp*, above note 59, held that where "the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text is desired, light from the object and purpose of the treaty as a whole may usefully be sought" (at para. 114)).

Since the direct delivery of health, education and social services cannot be considered to be financial services, the Annex would seem to provide no interpretive assistance with respect to understanding the scope of the governmental authority exclusion in these areas.[317] Some have suggested, however, that certain government activities, such as schemes for the payment of health benefits under provincial plans and employment insurance, may be characterized as being in the nature of insurance, which is a financial service within the meaning of the Annex. In relation to health care, for example, the argument is that our public system — where funding of health services to individuals is provided by the state — can be analogized to an insurance system and typically is described using this terminology.[318]

However, apart from the use of the term "insurance" there is little about Canada's public health system that is like insurance. Under the United Nations Provisional Central Product Classification categories referred to in Canada's national schedule of commitments[319] insurance requires underwriting risk.[320] This involves an assessment by the insurer of the health risks to the insured person and the insurer agreeing to compensate the insured person for costs associated with future sickness or accident in return for the payment of a premium by the insured person that is set at a level commensurate with these risks. Under the *Canada Health Act*, however, provincial health plans must commit to paying for health care without any assessment of risk or requirement of a premium related to the risk and, in most Canadian jurisdictions, there is no requirement to pay premiums at all.

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[317] This conclusion is shared by Krajewski, above note 251, at 13; Luff, above note 262, at 18; and BC Discussion Paper, above note 254, at 41.

[318] Sanger, above note 5.

[319] The full text of Canada's specific commitment in relation to health insurance is set out in Appendix III to this study. Canada listed "Life, Health and Accident Insurance Services" and referenced the Provisional CPC (above note 38) code 8121. This code does not, in fact, include health insurance services, though the WTO Secretariat's Classification List (W/120, above note 38) identifies life, health and accident insurance using this number. However, Canada has listed "Non-Life Insurance" and referenced Provisional CPC code 8129, which does include health and accident insurance. The question of whether Canada has voluntarily accepted commitments that extend to the public funding of health care by listing health insurance in this way is discussed below. See below, notes 417-425 and accompanying text.

[320] Provisional CPC, *ibid.*, subclass 81291 is "Accident and Health Insurance." The note to this sub-class explains the subclass as "Insurance underwriting services consisting in making payments for covering expenses due to accident or sickness by the policy holder." Other definitions of insurance services adopt a similar approach. See, for example, the definition of insurance in the OECD Arrangement for Guidelines on Officially Supported Export Credits, http://www.oecd.org/dataoecd/52/3/2763846.pdf (accessed November 13, 2003), at 18.

It is worth noting in this regard that the Provisional CPC Group including "Accident and Health Insurance"[321] expressly excludes "compulsory social security services." These are categorized separately under Group 913.[322] Compulsory social security services specifically include sickness and temporary disablement benefits.[323] While Canada's health care funding system may not be fully captured by the expression "sickness and temporary disablement benefits" it is more in the nature of a social security service of this kind than insurance. In the current revision to the CPC, all government health benefits programs are specifically excluded from the health insurance category.[324] On balance, there would seem to be no clear basis to conclude that Canada's public health funding should be considered health insurance.[325]

Similarly, with respect to EI, the government does not engage in any risk assessment to determine eligibility for Employment Insurance or what premiums to charge. Provisional CPC Group 913 lists unemployment compensation benefits under compulsory social security services, confirming that Employment Insurance is not properly considered to be insurance. Consequently, the argument that Canada's employment insurance system should be treated as a kind of insurance is also a tenuous one.

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[321] Provisional CPC, *ibid.*, subclass 81291 for "Accident and Health Insurance" is part of Group 812. Compulsory social security services are excluded from the entire group.

[322] Provisional CPC, *ibid.*, Class 91291.

[323] Provisional CPC, *ibid.*, Group 913, includes unemployment compensation benefits in Class 9133 and sickness and temporary disablement benefits in Class 9131. Sanger, above note 5, interprets the Provisional CPC category for Accident and Health Insurance as including public health care plans (at 80).

[324] United Nations Central Product Classification, Version 1.1, Subclass 71320, Accident and Health Insurance, http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=16&Lg=1&Co=71320 (accessed November 13, 2003).

[325] The question of whether Canada has voluntarily accepted commitments that extend to the public funding of health care by listing health insurance is discussed below. See below notes 417-425 and accompanying text.

The structure of the Annex of Financial Services supports these conclusions. It defines financial services as including insurance[326] but then defines financial services supplier as excluding public entities[327] except those principally engaged in providing insurance on commercial terms. Since provincial health plans and HRSDC and the Canadian Employment Insurance Commission are public entities and do not provide insurance on commercial terms, they are not supplying a financial service for the purposes of the Annex.[328] Because they are not supplying a financial service and financial service includes insurance, under the terms of the Annex, these entities are not providing insurance services.

Notwithstanding these conclusions, however, the language of the Annex suggests that most measures relating to Canadian health funding and employment insurance programs should be considered under the Annex. The Annex applies to "measures affecting the supply of financial services." Canada's health and employment insurance programs, as well as the other social programs considered in this study, undoubtedly affect the ability of private insurers to provide insurance for these services. As well, in defining "services supplied in the exercise of governmental authority" the Annex specifically refers to "statutory systems of social security" and "other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government." Because public funding of health care and some of the other social programs considered in this study as well as EI and CPP are statutory systems of social security and activities conducted by public entities within the meaning of the Annex, they would seem to fall squarely within the scope of the Annex. Consequently, it is the Annex's definition of the governmental authority exclusion which is the more relevant one in considering the application of the exclusion to health and employment insurance and the other social programs that are the subject of this study.[329]

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[326] GATS, Annex on Financial Services, Art. 5(a)(i).

[327] *Ibid.*, Art. 5(b)).

[328] Public entity is defined as:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions (*ibid.*, Art. 5(c)).

The application of the governmental authority exclusion as defined in the Annex to public funding of health care and EI is discussed in Section 6 of this study. In the remainder of this section the scope of the exclusion in the Annex is discussed in general terms.

The Annex on Financial Services elaborates and customizes the definition of services supplied in the exercise of governmental authority, as it applies to measures affecting financial services, in the following terms:

> 1. *Scope and Definition*
>
> ...
>
> (b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:
>
> ...
>
> (ii) activities forming part of a statutory system of social security or public retirement plans; and
>
> (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

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[329] To the extent that measures relating to health funding and employment insurance and other social service benefits programs do not affect financial services, the applicability of the GATS would be determined under Art. I.3(b) and (c).

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

Unpacking these provisions, the use of the word "means" in section 1(b) suggests an intention to define exhaustively how the governmental authority exclusion is to be interpreted in relation to measures affecting financial services. The governmental authority exclusion, as defined in the Annex, seems to be limited to activities engaged in by public entities, and not private entities exercising powers delegated by the state. Even the activities of public entities may not qualify unless they are for the account of government or use the financial resources of government.[330]

The significant difference between the scope of the governmental authority exclusion under the Annex on Financial Services and under Article I.3 is that the two requirements in Article I.3(c) do not apply under the Annex. It does not matter whether the service is supplied on a commercial basis or in competition with other services suppliers as required by Article I.3(c). In substitution for these requirements, it is provided that the exclusion is not available where Canada permits private financial services suppliers[331] to conduct any otherwise excluded activities in competition with the public entity.

Competition, for the purposes of the definition in the Annex, should be interpreted in the same manner as discussed above, except in one important respect. Under Article I.3(c), services "supplied in competition with one or more service suppliers" fall outside the exclusion. It was suggested above that these words could give competition a "one-way" meaning: it is the entity whose services are otherwise subject to the exclusion that must be competing for the application of the exclusion to be lost. It is irrelevant if there are private sector service suppliers who are seeking to take business away from this entity. By contrast, in the Annex on Financial Services, it is irrelevant whether this entity competes. The only issue is whether private service suppliers are permitted to compete with it or with each other.[332]

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[330] However, Public entity is defined to include "a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions."

[331] The definition of "financial services supplier" in the Annex on Financial Services, above note 326, specifically excludes public entities (Art. 5(b)).

Consequently, if a public entity operating under a statute were to provide a public social security scheme, like providing benefits for injuries sustained in car accidents, it would fall outside the governmental authority exclusion as defined in the Annex if private sector insurers were permitted to provide insurance for such injuries in competition with the services provided by the public entity. The fact that the public entity itself did not operate so as to compete with the private sector insurers would not mean that the exclusion was available in relation to its services.

Summary

Except for measures covered by the Annex on Financial Services, in order to fall within the governmental authority exclusion and outside the application of the GATS, a service must meet two requirements. The service must not be supplied:

- on a commercial basis; or
- in competition with other service suppliers.

This first requirement has two aspects. For services to be found to be supplied on a non-commercial basis, it was argued that the service must be supplied on a not-for-profit basis in the sense the service supplier must be organized and operate to supply the service exclusively for a purpose other than earning profits. The second aspect of the non-commercial requirement is government involvement in the delivery of the service. The words "in the exercise of governmental authority" form part of the context for interpreting the requirement that services not be offered on a commercial basis. The precise content of this governmental aspect of the exclusion is difficult to specify in the abstract. It was argued that government involvement must be such as to show that the service is being delivered to fulfill a government, rather than a private, purpose. In this regard, it is irrelevant whether the entity supplying the service is a public or private entity. With respect to private entities, government involvement would be shown not only by state delegation of responsibility for supplying the service but also by extensive state control over budget, management decision making and other aspects of the delivery of the service.

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[332] The exclusion would still be available even if other public sector suppliers were permitted to compete because "financial services supplier" is defined in the Annex on Financial Services as excluding public entities. The definition of "public entity" is set out above in note 328.

Determining whether the service of a particular supplier is supplied in competition with other service suppliers for the purposes of GATS Article I.3 depends, in part, on an assessment of whether the services supplied by that supplier can be considered substitutes, in some sense, for those of others. As well, the conditions of the market must be such that suppliers can and do seek to attract the same customers as other service suppliers. With respect to assessing whether services are substitutes, it is possible that the established jurisprudence on like goods will be used as a guide, though whether services are supplied in competition does not depend on simply a conclusion that services are like. Services supplied in competition may not be like and services that are like may not be in competition. Differences between public and private services, modes of supply and other factors may all be relevant in particular cases.

For the purposes of the governmental authority exclusion in Article I.3, competition could have a "one-way" meaning. Under this interpretation, it would be sufficient for the services of a service supplier to fall within the exclusion if it does not seek to compete with other service suppliers. The availability of the exclusion to the services of the supplier would not be affected if other suppliers were engaged in competition.

With respect to measures affecting financial services, the requirements for the governmental authority exclusion are set out in the Annex on Financial Services and are somewhat different. To fall within the exclusion, the service must consist of "activities forming part of a statutory system of social security or public retirement plans; [or] other activities conducted by a public entity for the account or using the financial resources of the Government." As well, competition by other service suppliers cannot be permitted.

Finally, even though the words used in setting out the governmental authority exclusion are the starting point for interpreting the exclusion, the preamble of the GATS is also an essential part of the context for interpretation. Consistent with the preamble of the GATS, the exclusion should not be interpreted narrowly at the expense of Canada's right to regulate as it sees fit, even in the interest of promoting services trade liberalization.

These conclusions regarding the scope of the governmental authority exclusion are based on the approach likely to be adopted by a WTO dispute settlement panel hearing a complaint that a government measure breaches some provision of the GATS. It must be acknowledged that, given the untested nature of the exclusion, the conclusions are necessarily somewhat speculative and that there is residual uncertainty[333] regarding how the provision will be applied in real cases.[334] Some such uncertainty is the inevitable consequence of applying a short, broadly worded treaty provision to services subject to a range of complex regulation. Nevertheless, it makes reliable conclusions about the extent to which GATS commitments apply to health, education and social services difficult.

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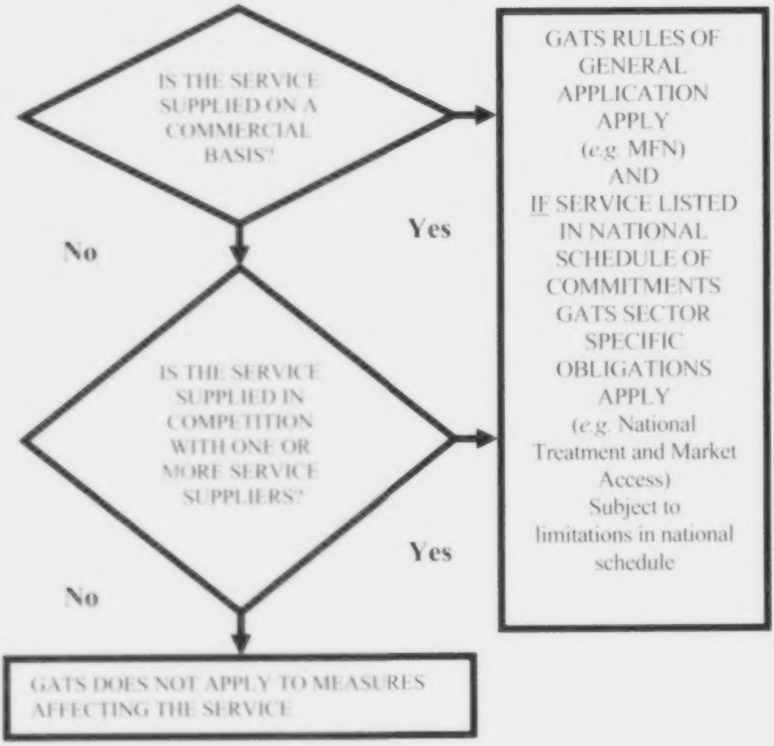
[333] Krajewski recommends the adoption of an amendment or agreed understanding to reduce the uncertainty (Krajewski, above note 251, at 20). Similar concerns regarding the need for further specification of the content of the governmental authority exclusion have been expressed by the Chairman of the Working Party on GATS Rules (Working Party on GATS Rules, Report of the Meeting held on 19 February 1999, S/WPGR/M/20, at 13).

[334] In circumstances where the government is funding the supply of a service, issues will also arise as to when the transaction should be characterized as procurement by government and therefore not subject to the MFN, national treatment and market access obligations in the GATS. This point is discussed below. See notes 394-397 and accompanying text.

In Section 6, the approach to interpreting the governmental authority exclusion developed in this section is applied to health, education and social services based on the characterization of the funding, delivery and regulation of these services developed in Section 4 of this study. Measures affecting trade in services covered by the agreement are subject to GATS obligations. In Section 7 of this study, the impact of the GATS on those services found to be subject to the agreement is examined. As discussed in detail below, even for those aspects of such services that are subject to the GATS, the Agreement provides no apparent basis for a challenge to the manner in which they are currently delivered or to the schemes by which they are regulated.

Structure of the Governmental Authority Exclusion


IS THE SERVICE SUPPLIED ON A COMMERCIAL BASIS?
Yes
No
IS THE SERVICE SUPPLIED IN COMPETITION WITH ONE OR MORE SERVICE SUPPLIERS?
Yes
No
GATS RULES OF GENERAL APPLICATION APPLY (e.g. MFN) AND IF SERVICE LISTED IN NATIONAL SCHEDULE OF COMMITMENTS GATS SECTOR SPECIFIC OBLIGATIONS APPLY (e.g. National Treatment and Market Access) Subject to limitations in national schedule
GATS DOES NOT APPLY TO MEASURES AFFECTING THE SERVICE

6. What's In and What's Out–Applying the Governmental Authority Exclusion to Health, Education and Social Services

(a) Health Services

Public Funding of Health Care

Canada's national system of health funding under the *Canada Health Act* falls within the governmental authority exclusion as defined in the Annex on Financial Services and is not subject to the GATS. Even though our system should not be characterized as analogous to a health insurance scheme, the application of the GATS depends on whether it falls within the special meaning of the exclusion set out in the Annex because public funding of health care may affect the services that private health insurance companies are able to offer.

The Annex's requirements for the exclusion are, however, easily satisfied. It is widely recognized that the maintenance of the health of a nation's citizens is a fundamental governmental responsibility.[335] In Canada, health care funds are provided by the federal and provincial and territorial governments to physicians and other health services suppliers through provincial and territorial health plans in a manner that is designed to ensure the attainment of the public purposes set out in the five criteria of the *Canada Health Act*: public administration, comprehensiveness, universality, portability and accessibility. The preamble to the *Canada Health Act* makes clear that the criteria themselves are designed to ensure that the system achieves a measure of social security.[336] Provincial and territorial plans are public entities accountable for the administration of health funding in a way that meets these criteria. As such, Canada's system of funding basic health care through provincial and territorial plans is a "statutory system of social security" or "other activit[y] conducted by a public entity," within the meaning of the governmental authority exclusion as defined in the Annex on Financial Services.

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[335] State obligations regarding health are recognized in the *Economic, Social and Cultural Rights Covenant*, above note 147, Art. 12(2)(d): "The steps taken by State Parties to the present Covenant to achieve this right [the right to "enjoy the highest attainable standard of physical and mental health"] shall include those necessary for…the creation of conditions which would assure all medical service and medical attention in the event of sickness." These words suggest that matters relating to health are a government responsibility (cited in Sanger, above note 5, at 4). See also the discussion in Chapter 5 of the Kirby Report, above note 6, at 99-108.

[336] The preamble states, among other things, that, in enacting the *CHA*,

With respect to the second criterion set out in the Annex, there is no competition with the public system by private suppliers of insurance services. Public health benefits are provided pursuant to a universal service obligation and with no intention to compete with private services suppliers. Competition with the public system is precluded by statute in most provinces. It has been precluded in practice by a combination of other government restrictions on privately funded health care in the others. As long as these conditions continue to exist, the exclusion will be available. If circumstances changed and competition by private sector insurers became permitted, the availability of the exclusion would become doubtful.[337]

Similarly, provincial programs that fully fund health services outside those funded under the *Canada Health Act* are

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above note 82, Parliament recognizes that "continued access to quality health care without financial or other barriers will be critical to maintaining and improving the health and well-being of Canadians."

[337] The conclusion that provincial health insurance plans, as they currently operate, are excluded from the application of GATS under Art. I.3(b) is shared by Johnson, above note 260, at 18; Sanger, above note 5, at 76-81 (with some reservations); and *CCPA Report on Health*, above note 111, at 22. The Romanow Report, above note 5, concludes that there is a "strong consensus" that the existing system cannot be challenged (at 237). Because of the special definition of the governmental authority exclusion in the Annex on Financial Services, there is no need to consider whether the service is provided on a commercial basis. In any case, health insurance services under the *CHA*, above note 82, are provided on a non-commercial basis. Provincial plans do not seek to profit or recover costs from consumers. In all but three provinces, services are provided without charge. In the provinces in which charges are levied, payment is not a condition of receiving treatment. Service charges are not related to the cost of services consumed. Sanger notes that at least one province has experimented with insuring services outside those insured under the *Canada Health Act* in competition with private insurers (Sanger, *ibid.*, at 83-4). This kind of activity would be outside the governmental authority exclusion.

supplied in the exercise of governmental authority, as long as private insurers are precluded from insuring the same services. To the extent that competition by private insurers is allowed, the exclusion would not apply.[338] As discussed below, the health services themselves may not be supplied within the exclusion in some cases, but the service of providing the funds would be.

Basic Health Services Insured Under the Canada Health Act

Introduction

Even though the funding of basic health services under the *Canada Health Act* fulfills a fundamental state responsibility, not all aspects of the delivery of these services may be found to be within the governmental authority exclusion. Hospital services are likely to be found to be within the governmental authority exclusion, and thus not subject to the GATS, but the same conclusion is doubtful in relation to the services of physicians and other health services insured under the *Act*.

Hospital Services

The services of most hospitals in Canada are likely within the governmental authority exclusion and are not subject to the GATS. Publicly funded hospital services are not offered on a commercial basis because they are supplied on a not-for-profit basis and with significant government control over the manner of their delivery.[339] As well, they do not engage in competition. The services of private hospitals are subject to the Agreement.

Publicly funded (or what are often referred to simply as "public") hospitals are not-for-profit institutions in the sense that all funds are directed exclusively to the fulfillment of their public purpose.[340] No financial benefit is received by the members of hospital corporations in connection with hospital services. "Public" hospitals do not sell their basic services to patients. There is no commercial exchange of payment for services by patients. Expenses are funded by the province or territory on the basis of budgets approved by provincial or territorial authorities with a view to covering costs.[341] Because they offer services on a not-for-profit basis, the first attribute that a service must have before it can be found to be supplied on other than a commercial basis is present.

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[338] In the provinces in which private insurance is permitted and only the weakness of market conditions has precluded the development of a market for private insurance, the availability of the exclusion is less certain.

[339] Sanger, above note 5, at 93.

[340] In the *Hospital Act* of British Columbia, for example, hospitals are defined as not-for-profit institutions "operated primarily for the reception and treatment of persons (a) suffering from the acute phase of illness or dis-

As well, "public" hospital services insured under the *Canada Health Act* are supplied with sufficient government control to satisfy the second aspect of services offered on a non-commercial basis under the governmental authority exclusion. Hospital management is accountable to government, budgets require government approval and government may determine what services they offer. The transfer of administrative responsibilities of hospitals to government-run regional health authorities in most provinces further strengthens the argument that hospitals do not operate on a commercial basis. Indeed, hospitals are so entirely subject to government control that one leading commentator has concluded that they "look and act like government owned hospitals."[342]

Regarding competition, patients may choose which hospital to visit for many purposes, and the services of one hospital are likely to be found to have substitutes from a patient's point of view.[343] Nevertheless, "public" hospitals do not engage in rivalrous behaviour in relation to each other or private hospitals.[344] "Public" hospitals do

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ability, (b) convalescing from or being rehabilitated after acute illness of injury, ..." (above note 118, s. 1).

[341] Some hospital expenses are funded by community contributions.

[342] Flood, above note 81, at 40. In *Eldridge* v. *British Columbia*, [1997] 151 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada held that the Charter of Rights and Freedoms did apply to hospitals to the extent that their action was "'governmental' in nature – for example the implementation of a specific statutory scheme or a government program" (at 607-8).

[343] No distinction is made in the Provisional CPC, above note 38, between public and private hospitals.

[344] Hospitals may engage in rivalrous behaviour that is non-economic,

not compete for business because their mandate is simply to provide health services, not to maximize revenues in excess of expenditures. The fact that budgets typically depend, in part, on expectations regarding the number of patients may be thought to suggest an economic incentive to competition. Budgets are only set in this manner, however, as a way of allocating funds to cover costs. As a result, "public" hospitals are unlikely to be found to be in competition.

To the extent that some private hospitals are permitted to operate, as they are in some provinces, this conclusion might not change. The analysis in Section 5 found that the protection of the governmental authority exclusion might only be lost for a particular service if the provider of the service competes. In accordance with this "one-way" meaning, so long as "public" hospitals do not, themselves, engage in rivalrous behaviour, their services are not supplied in competition with the services of private hospitals.

If the proposed "one-way" interpretation of competition is not found to be correct by some future WTO panel, then in principle, any competition by private hospitals would be sufficient to take "public" hospitals' services outside the governmental authority exclusion. It is not obvious, however, that competition will be found to exist. At the present time, there are relatively few private hospitals in Canada and most provide a limited range of specialized services,[345] such that, in any geographic market, there may be no competition by private hospitals. Also, it is likely that more than some minimal level of competition would be necessary to take the services of "public" hospitals out of the governmental authority exclusion.[346] It may

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such as rivalry to be the exclusive provider of certain services. Recently, for example, both the Children's Hospital of Eastern Ontario and the Hospital for Sick Children vied for the exclusive right to provide child cardiac surgery.

[345] See above note 120 and accompanying text suggesting that there are over 300 private clinics that provide some of the same services as "public" hospitals.

[346] For example, the Shouldice Clinic in Toronto is a private for-profit hospital that offers surgical services relating exclusively to hernias. Hernia surgery is also offered in "public" hospitals. Procedures in both settings are covered for Ontario residents by the provincial health plan. Given the limited capacity of the Clinic can it be said that it provides competition with hospitals in Toronto? The Shouldice has an international reputation and at-

be that in many markets competition by private hospitals would not meet such a *de minimus* threshold.

As well, the existence of competition will vary depending on the circumstances. While services of private and "public" hospitals may not be regarded as perfect substitutes due to differences in, for example, waiting times and techniques and equipment used, they may be functionally the same. As well, at least at the point that private hospitals enter the market for the first time, they will be seeking to attract existing customers from "public" hospitals and thus be in competition. After the market has matured, it may become sufficiently segmented that the services of "public" and private hospitals are regarded as not competing: those with sufficient resources use private hospitals and those without use publicly funded services. Were such a two-tiered system to develop, the governmental authority exclusion may again be available for the services of "public" hospitals on the basis that they would no longer be in competition with private hospitals.[347]

If private for-profit hospitals provide provincially funded services, then they could be in competition with "public" hospitals providing the same services. The supply of certain insured services by approved private surgical facilities is now permitted in Alberta.[348]

If all that is needed is some competition by private hospitals to take "public" hospital services outside the governmental authority exclusion, then the exclusion may not be available in some limited circumstances. This study has concluded, however, that the governmental authority exclusion could be interpreted as being available to the services of any supplier that does not compete. Since "public" hospitals do not compete, their services should be within the exclusion and measures relating the "public" hospitals should not be subject to the disciplines of the GATS.

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tracts patients from throughout Canada. Does that mean that the activities of the Shouldice compete with all hospitals in Canada?

[347] The position taken is contrary to that adopted by the WTO Secretariat in WTO Note on Health and Social Services, above note 216, at 11.

[348] *Health Care Protection Act*, R.S.A. 2000, c. H-1.

Physician Services Insured under the *Canada Health Act*

Physicians who provide services that are paid for by provincial and territorial health plans under the *Canada Health Act*, whether in or outside hospitals,[349] operate, in most cases, as private for-profit suppliers. Consequently, their services are outside the governmental authority exclusion and subject to the GATS. Physicians' services are supplied on a commercial basis because physicians operate for-profit in the sense that they supply their services for the purpose of receiving the financial benefits associated with doing so, and not exclusively for some non-financial purpose. Admittedly, physicians have relatively little control over their net income from provincial and territorial health plans. Physicians do not engage in market exchanges with their patients and do not bill patients directly. Their rates are fixed and total billings are capped, though they have some control over their expenses. But, they do sell their services to provincial and territorial health plans at rates set by the plans at levels intended to provide reasonable compensation. Such compensation more than covers the costs incurred by individual doctors in supplying their services. No argument may be made that they are operating on a not-for-profit basis.

The degree of government control over physicians' services probably is not sufficient to conclude that the second aspect of services being offered on a non-commercial basis is satisfied. The state has a significant role in determining whether and how an individual delivers the services of a physician. Physicians are licensed and subject to regulation by the state to ensure the maintenance of high professional standards. As noted, pricing of their services is fixed by provincial and territorial health plans and their total remuneration is subject to government imposed ceilings. Despite this level of state intervention, physicians have control over who they treat, what treatment they provide and when they provide it. The state does not control the delivery of physician services in the way that it does with hospital services. On balance, physicians retain sufficient control over their services that it would be difficult to justify a conclusion that physician services are controlled by the state in order to fulfill a government purpose.

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[349] Some physicians are employed by the hospital and receive a salary (*e.g.*, some emergency room physicians). Other physicians who work in hospitals fall into one of two categories: (i) those who have "privileges" to perform services in a particular hospital (*e.g.*, deliver babies) but generally operate from their own premises and bill provincial health plans directly for their services - whether performed in the hospital or elsewhere and (ii) physicians who generally operate from an office within the hospital and perform their services in hospital but bill provincial health plans directly for their services (*e.g.*, some surgeons). Where physicians' services are performed in hospital, the related hospital services (*e.g.*, nursing and other staff, equipment and facilities) would be paid for out the hospital budget.

It is less obvious that physicians compete with each other. Services of physicians may be substitutes in many cases and patients have the power to decide which physicians they visit, within limits. In markets where there is an excess of physicians, one may imagine that physicians may seek to maximize their income by attracting patients from other physicians. In the Canadian context this scenario is unlikely given the general shortage of available physicians in most locations.[350] Efforts by some provinces to require physicians to practice in specific areas diminish the prospects for competition.[351] Finally, physicians cannot compete on price when supplying insured services. While competition on non-price determinants of demand, such as quality of service, is certainly possible, no evidence was found to demonstrate that this occurs in practice in relation to basic health services.

Regardless of the weakness of the evidence regarding whether physicians operate in competition, it seems clear that physicians supply their services on a commercial basis. Accordingly, the governmental authority exclusion does not exclude their services from the application of the GATS.

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[350] According to the OECD, Canada has fewer physicians per capita than most other OECD Member countries. In 2000, Canada had 2.1 practising physicians per capita, well below the OECD average of 2.9. See OECD, *Health at a Glance – OECD Indicators 2003 – Briefing Note Canada* (2003).

[351] If physician services were considered to be purchased not by individual patients but by provincial health plans and this constituted government procurement within the meaning of GATS Art. XIII, the MFN obligation would not apply. This study concludes below that payments to physicians under provincial health plans would not be considered government procurement. See below notes 394-397 and accompanying text.

Supplementary Health Services

Other Services of Health Professionals

Physician services and other services provided by health professionals (including alternative/complementary services) that are not insured under the *Canada Health Act* will not be carved out of the GATS under the governmental authority exclusion in most cases. Even to the extent that some such services are funded by government to some extent in some provinces, delivery is by private, for-profit services suppliers operating on a commercial basis. Suppliers provide their services with a view to receiving financial returns, not for some other purpose. Health professionals exchange their services for direct payment by patients at prices exceeding costs. While each type of professional may be subject to more or less intrusive regulation designed to ensure standards of competence, there can be no argument that such regulation means that their delivery is controlled by the state to fulfill a government purpose. Laser eye surgery clinics operating on a for-profit basis are a clear example. Government has a limited role in controlling the manner in which such services are delivered.

No evidence was found regarding the level of competition in the market place among health professionals. The services of health professionals of a particular type, such as those provided by different laser eye surgery clinics, may be regarded as substitutes for each other. Rivalry may be muted by an excess of demand over supply in some cases, but given the economic incentives under which health professionals operate it seems likely that competition exists. Health professionals may be able to increase their revenues by attracting more patients or charging higher prices or both.

The extent to which health services provided by physicians and other health professionals are funded under provincial or territorial programs outside the *Canada Health Act* would make no difference to these conclusions. The operation of existing programs, which fully or partially fund, for example, dental care for seniors, the disabled and welfare recipients, would not change the fact that these services themselves are delivered on a commercial basis and possibly in competition with each other.[352]

The analysis above applies equally to hospital services not insured under the *Canada Health Act*, such as private rooms, for which patients must pay directly as well as ancillary services, like operating parking lots. To the extent that such services are sold to the patient who pays for them out of pocket and are made available at prices that are intended to recover more than all costs associated with the service, they might be considered to be separate services supplied on a commercial basis and, therefore, outside the governmental authority exclusion. Since these additional privately funded services are minor aspects of hospital operations incidental to the provision of the basic insured service and the funds are plowed back into the funding of hospital services, one might argue that they should be considered to fall within the exclusion. As suggested in Section 5 of this study, however, the better view is that they should be treated as separate services provided on a commercial basis.[353] Practically, however, it may be difficult to determine to what extent any particular measure related to hospital services applies to this subset of hospital services and is therefore subject to the GATS.

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[352] The impact of the GATS in relation to individual services suppliers is limited by the GATS Annex on the Movement of Natural Persons which provides that the GATS does not apply to measures affecting natural persons seeking access to the employment market of a Member, nor to measures regarding citizenship, residence or employment on a permanent basis. See A. Carzaniga, "The GATS, Mode 4, and Patterns of Commitments" in Moving People to Deliver Services, A. Mattoo & A. Carzaniga, eds., (Washington: World Bank and Oxford, 2003), at 23. So, while the services of individuals may be subject to the GATS, measures relating to permanent employment in Canada are not subject to the Agreement. Other measures relating to individuals who enter Canada on a temporary basis to provide services or to work at the Canadian premises of a foreign service supplier would be subject to the Agreement. As discussed in Section 7 of this study, the impact of this obligation is likely minimal because Canada has no national treatment or market access obligations to individual suppliers of health or education services.

[353] Sanger concludes that services provided by hospitals on a for-profit basis would be subject to the GATS (Sanger, above note 5, at 93).

Nursing and Old Age Homes

The variety in the manner in which nursing home services and other long-term care services are delivered and funded renders impossible any attempt to arrive at a single general conclusion regarding whether such services fit within the governmental authority exclusion. Nursing homes provided by private for-profit services providers are not within the governmental authority exclusion. They operate on a commercial basis in that they seek to generate profits for their shareholders, not to carry out some other purpose.

Nursing home services may meet the other identified criteria for the application of the exclusion. Looking at the second aspect of the "not-on-a-commercial-basis" criterion, provincial licensing requirements designed to ensure standards for nursing home operations represent a very high level of state involvement in the manner in which services are delivered. In Ontario, for example, even the manner in which meals are to be served is the subject of services standards. This degree of state control may be sufficient for their services to approach the level needed to meet the second requirement for services to be offered on other than a commercial basis for the purpose of the exclusion. As for-profit undertakings, nursing homes likely compete with each other to some extent. In jurisdictions, like Ontario, in which all nursing homes must be licensed and are subject to comprehensive regulation, however, competition may be weak. Where the location and number of facilities, rates charged and quality of services are all strictly controlled and licences are issued only if the provincial regulator determines that there is sufficient demand, there may be little basis for competition. Even in these circumstances, however, if there is a large surplus of long-term care beds, nursing homes may seek to compete in an effort to ensure that occupancy levels are maintained.

The situation with old age homes that do not provide medical services is similar except that more are operated by not-for-profit organizations and municipalities. Old age services provided by for-profit suppliers would be subject to the GATS. Just like for-profit nursing homes, for-profit old age homes fail to meet the first aspect of the not-on-a-commercial basis requirement. With respect to competition, for-profit old age homes likely engage in competition.

Where to place old age home services provided by not-for-profit organizations is less obvious. Based on the criteria developed, so long as they are operated exclusively to provide old age home services on a not-for-profit basis and any occasional surplus of revenues over expenses is plowed back into service delivery, then these services meet the first aspect of the not-on-a-commercial-basis requirement. However, the services of private not-for-profit old age home providers, even in jurisdictions in which they are regulated, will be subject to the GATS because there is little government involvement in the delivery of their services. Without extensive government involvement, their services would be offered on a commercial basis within the meaning of the governmental authority exclusion and not carved out of the GATS.

It is not obvious that not-for-profit old age homes compete. Given their mandate, they may not compete with other service suppliers. Depending on the existence and nature of any licensing or other form of regulatory regime, competition may be restrained. Nevertheless, to the extent that not-for-profit homes fail to meet the not-on-a-commercial-basis requirement, their services would be subject to the GATS.

To the extent that municipalities or other governments supply old age home services directly and are not operating on a commercial basis nor seeking to compete with each other or other providers of these services, the services that they provide would appear to meet the requirements of the governmental authority exclusion. As a result, measures relating to the services of publicly run old age homes could be excluded from the GATS obligations. This conclusion relies on the correctness of the "one-way" meaning of competition suggested in Section 5 of this study. If any competition by private old age home operators is sufficient to remove the benefit of the exclusion, the services of publicly run homes would be subject to GATS, despite meeting all the other criteria for the application of the governmental authority exclusion.

Home Care

Compared to nursing and old age homes, the ways in which home care services are delivered in Canada are even more varied. Straightforward generalizations regarding the application of the governmental authority exclusion are not possible.

Home care services are supplied directly by the state to some residents in Saskatchewan and Manitoba and, in the case of professional services, Alberta and Quebec, though eligibility requirements differ between the provinces. In all these provinces, the home care sector appears to be segmented in terms of the application of the GATS. The provision of home care services by the state to persons meeting the relevant eligibility requirements may fall within the governmental authority exclusion. Such services are supplied on other than a commercial basis. They are not supplied in competition with one or more service suppliers if there are no private home care providers. If, as is more likely the case, the government service supplier has no mandate to compete and does not compete with private home care suppliers, then its should services would be excluded.

Privately funded home care provided by private for-profit suppliers available to everyone else in these provinces would be found to fall outside the exclusion in any case. Not-for-profit providers of home care, like the Victorian Order of Nurses, are organized and operated exclusively to provide home care services on a not-for-profit basis and no one personally benefits from any surplus of income over expenses. They may not seek to compete. Nevertheless, in the absence of extensive government involvement in delivery, their services would not fall within the governmental authority exclusion and the GATS would apply. If competition by any supplier in the sector is sufficient to take the whole sector outside the governmental authority exclusion, then the presence of private for-profit suppliers might mean that all home care services, including those provided by the state, would be subject to the GATS. Determining whether in fact private firms compete with state-funded home care would require a careful analysis of the conditions of each local market.

In provinces like Ontario, where most home care is delivered by private not-for-profit and for-profit suppliers, but some state funding is provided for the benefit of targeted groups, the analysis would be similar. All aspects of these home care services would be outside the governmental authority exclusion.[354] Applying the same analysis rehearsed above, for-profit and private not-for-profit providers would be found to be operating on a commercial basis. The case for subjecting the services of not-for-profits to the GATS is even stronger to the extent that not-for-profits compete head-to-head with private for-profit services providers for public funding by bidding for provincial contracts.

(b) Education Services

Primary and Secondary Education

The services of public primary and secondary schools likely fall within the governmental authority exclusion and so are not covered by GATS obligations.[355] Public education is delivered on a non-commercial basis. Through provincial ministries of education and school boards, the state funds primary and secondary education, determines its content and is responsible for its delivery. No payment is made for public education services by Canadian students or their families as a condition of gaining access to schools. While contributions required of, or volunteered by, parents are increasing in frequency and magnitude,[356] they do not remotely approach costs. Any funds raised go directly to the delivery of the schools' programming.

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[354] Sanger reaches the same conclusion, above note 5, at 101. A thorough discussion of home care in Canada is provided in Jackson and Sanger, above note 8, at 79-111; and Fuller, above note 116.

[355] The WTO Secretariat has suggested that basic education "may be considered" to be within the Governmental Authority Exclusion (*WTO Secretariat Note on Education Services*, above note 147, at 4). Sauvé, above note 179, suggests "ask any negotiator in Geneva and she/he would be prone to regard primary and secondary schooling, so-called basic education, as lying outside the scope of GATS" and later that the "[c]ommon understanding at the inter-governmental level is thus that public education services and education services supplied by private actors on a non-commercial basis are excluded from the GATS (as are all government measures, including in respect of public funding relating to the supply of such services)" (at 3). As discussed in this section, the trouble with these generalizations is that they are not supported by a developed legal analysis of the text of the GATS. Nor do they take into account the particular situation in Canada or elsewhere.

[356] Grieshaber-Otto & Sanger, above note 7, at 118.

Public schools do not compete with each other or with private schools. Services must be offered to everyone on a take it or leave it basis. Students may choose to attend private schools instead of public ones, but public schools are not engaged in competition to retain students or to attract them from private schools. As with hospitals, the fact that most operating funding for public schools may be allocated on a per pupil basis does not mean that public schools have an economic incentive to compete. The main purpose of allocating budgets in this way is to ensure that funding is commensurate with costs.

The strength of the conclusion that public schools do not operate on a commercial basis and do not compete is being eroded in some cases, as public schools dealing with funding constraints seek new ways to raise money. Some public schools, for example, are competing with private schools for fee-paying foreign students.[357] British Columbia school boards have been permitted to set up for-profit corporations to carry out commercial activities for the purpose of earning revenues to support the delivery of public education services. These are for-profit services in that the price exceeds the cost of offering them.

One could argue that these services are reasonably incidental to carrying out the school's basic educational mandate of the schools involved and, so long as the funds raised are spent on delivery of the education program and the activity remains a relatively modest part of the school's operations, they should not be found to be offered on a commercial basis. The better view is that these activities are separate commercial activities. As such, these still exceptional activities are outside the governmental authority exclusion. Just because these services may be subject to the GATS, however, does not mean that the governmental authority exclusion does not apply to the basic educational services of public schools. As noted with respect to hospitals, such a distinction may give rise to some practical difficulties. It could be hard to determine the impact of GATS obligations on the subset of public school activities that are subject to the GATS in relation to particular measures that affect schools generally.

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[357] Grieshaber-Otto & Sanger, *ibid.*, at 52-56; Industry Canada – Commercial Education, above note 12, at 12-13. See above notes 197-200 and accompanying text.

The conclusions above are based on the "one-way" meaning of competition that was suggested in Section 5 of this study. If the governmental authority exclusion is interpreted as requiring the absence of competition by private schools with public ones, then the services of public schools would not be beyond the reach of the GATS.[358]

Private schools must be regarded as trying to attract students from public schools. Even not-for-profit schools must attract students to survive. In a general sense, the education services at public and private schools may be considered substitutes, though there are a variety of grounds upon which private school education may be distinguished from the education received in public institutions at least in some circumstances. Tuition fees, special programs and facilities and specialized instruction in subjects like religion are features of many private school programs, which are not present in the public schools. Private schools are not subject to the same constraints as public schools regarding curriculum and staffing. In some circumstances, all these and other differences might lead to the conclusion that private and public education should not be considered substitutes and, therefore, should not be found to be in competition.

Tuition and other differences are not always significant, however. In particular, in provinces like Alberta and Quebec that provide substantial state support to private school operators,[359] distinguishing private and public school services on the basis of tuition fees is becoming increasingly tenuous. Subsidizing private schools facilitates their competition with the public system.[360] As a consequence, if the governmental authority exclusion is interpreted as requiring the absence of competition by private schools with public institutions, it would become more difficult to sustain the position that the services of public schools are beyond the reach of the GATS. Nevertheless, so long as it is sufficient for public schools to fall within the governmental authority exclusion if they do not compete themselves, at least the services they offer without charge to Canadian students should be excluded from the GATS.

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[358] This is contrary to the straightforward assertion that public schools are excluded that is expressed in Industry Canada – Commercial Education, *ibid.*, at 2, 9.

[359] The initiatives of this kind across the country are discussed in Grieshaber-Otto & Sanger, above note 7, at 19-21. Some forms of state support reduce the effective burden of tuition.

Looking at the services of private schools themselves, even if they operate on a not-for profit basis,[361] their services are not within the governmental authority exclusion and they are subject to the GATS.[362] To the extent that they are for-profit organizations, they operate on a commercial basis. Schools operating on a not-for-profit basis may satisfy the first aspect of the not on a commercial basis requirement. Neither for-profit nor not-for-profit private schools, however, operate with sufficient state involvement in the delivery of their services to meet the second aspect of the not on a commercial basis requirement. Also, they may be found to compete with each other and with public schools.

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[360] Some advocate public support for private schools because of the salutary effects of competition (*e.g.*, C.R. Hepburn, *The Case for School Choice: Models from the United States, New Zealand, Sweden and Denmark* (Vancouver: Fraser Institute, 1999)). Others dispute this view and suggest that the specialized curricula of many private schools means that they do not truly compete with public schools but rather provide a different product to people who can afford it (*e.g.*, Ontario Secondary School Teachers Federation, *Private School Tax Credits – A Plan for Inequality: Response to Equity in Education Tax Credit Discussion Paper* (OSSTF, 2001)).

[361] While most private schools operate on a not-for profit basis, not all do. As well, some have close associations with for-profit management companies (Public School Boards Association of Alberta, *What are Public Schools?* http://www.public-schools.ab.ca/Public/story/different.htm (accessed November 14, 2003).

[362] This conclusion is consistent with the decision of the European Court of Justice which held that the setting up of private schools in Greece was not within the meaning of Article 55 of the Treaty of Rome (Judgment of the Court of 15 March 1988, *Commission of the European Communities* v. *Hellenic Republic*, Case 147/86, ECR 1988 1637). Article 55, as noted above note 254 and accompanying text, creates an exclusion for activities in the "exercise of official authority." It was argued above that Art. 55 is not directly relevant to interpreting Art. I.3 of the GATS. See notes 254-255 and accompanying text.

Higher Education

The case for including publicly funded universities, colleges and other institutions of higher education within the governmental authority exclusion is weaker than for public schools providing primary and secondary education. While universities and colleges do not seek to make profits, both are increasingly engaged in for-profit activities. As well, they are not subject to the same degree of government control as public schools or hospitals. As discussed below, however, the extent to which they compete with each other is not easy to discern.

Publicly funded universities and colleges operate on a not-for-profit basis. Any surplus of revenues over expenses in a given period is not available to any private person but must be devoted to fulfilling the educational mandate set out in their governing legislation or charter documents. Accordingly, this aspect of the requirement that services not be offered on a commercial basis appears to be satisfied.

The degree of government involvement in the activities of publicly funded universities, however, might not be sufficient to justify a conclusion that their services are not offered on a commercial basis. They are dependent on state funding to a considerable extent. Permission to operate as a degree-granting institution is carefully regulated by the state. Provincial governments control tuition levels to varying degrees. Though the situation varies quite a lot across the country, many universities' programs require prior provincial government approval and they often have government appointees on their governing bodies.

On the other hand, universities have a high degree of autonomy in determining how their services are delivered. Compared to "public" hospitals there is much less state involvement in determining what services may be offered. They establish their academic and admissions policies, program curricula and staff appointments without government intervention. Compared to "public" hospitals, education services supplied by

Canadian publicly funded universities are not subject to the same degree of state control over budgets. There is no bargaining with the state over their basic budget or how it is allocated and they have varying degrees of control over tuition revenues. While it is difficult to conclude that publicly funded universities operate for any private purpose, on balance, it is not clear whether the delivery of their services is controlled by the state to fulfill a government purpose so as to meet the second aspect of the not-on-a-commercial-basis requirement. This conclusion, however, cannot be considered definitive.

Governments are more directly engaged in the delivery of services by many publicly funded colleges across the country. Government intervention can extend to admissions policies, curriculum, institutional planning and working conditions in addition to greater control over funding and the level of student fees.[363] Boards are often appointed entirely by the provincial or territorial government, though seldom must they consist of government representatives. At least in some Canadian jurisdictions, the degree of government control over the delivery of college services is so extensive that they may be considered to be supplied exclusively to fulfill government purposes. As a result the services of publicly funded colleges are likely to meet the second aspect of the requirement that services be delivered on other than a commercial basis. Given the diversity in the way in which colleges operate across the country, the accuracy of this assessment may vary from one jurisdiction to the next.

Increasingly, colleges and especially universities are engaged in activities, such as executive training, computer and information-technology training, other kinds of adult education, contract research and computer consulting and other services offered at prices that may exceed their cost.[364] Some colleges make money from ancillary services, like operating parking lots and food services. Many universities seek to profit from the commercialization of university research. All these activities are likely to be characterized as separate services delivered on a commercial basis outside the governmental authority exclusion, even though proceeds from these activities are devoted to fulfilling the not-for-profit educational mandate of universities and colleges. Notwithstanding such a conclusion, however, core services provided by universities and colleges on a not-for-profit basis could still qualify as being offered on a non-commercial basis if the requirements of the governmental authority exclusion are otherwise met.

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[363] *Ibid.*

[364] A review of the publicly available financial information for a number of publicly funded universities found that there was insufficient disclosure to permit a cost/price comparison for individual activities. The Association of Universities and Colleges of Canada has suggested that universities carry on "for-profit" adult education and training (*AUCC Update*, above note 206, at 14).

On balance, it is not clear whether the services provided by publicly funded universities in Canada should be considered to be offered on a commercial basis within the meaning of the governmental authority exclusion. The services of many publicly funded colleges are more likely to qualify because of the greater state control over program delivery.[365] Even if the core programs of universities and colleges were found to fall within the exclusion, their forays into for-profit research, commercial education and training, ancillary services and for-profit activities associated with commercialization of research likely do not. Measures related to these services would be subject to the GATS. As with hospitals, it may be difficult to sort out in practice the extent to which measures applying to universities generally affect those services subject to the GATS and, for that reason, are subject to GATS disciplines.

Applying the requirement in the governmental authority exclusion that services not be supplied in competition with colleges and universities is not straightforward. The degrees and certificates granted by publicly funded universities and colleges in Canada may be considered substitutes for each other and, of course, students may choose which school to attend, subject to meeting the requirements for admission. As well, universities and colleges do demonstrate some rivalrous behaviour. They advertise and otherwise promote their services with a view to attracting students, both Canadian and foreign. But, at least with respect to Canadian students, this competition often lacks an economic aspect because there are more students seeking places in Canadian institutions of higher education than there are places available.[366] The "competition" in most cases is simply to attract the best students. Given this situation, the fact that funding from the provinces and tuition revenues depends in part on how many students the institution can attract should not necessarily lead to a conclusion that universities must be in competition. Funding on this basis is primarily intended to ensure that anticipated operating costs are covered.

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[365] Many commentators suggest that higher education services do not fall within the Governmental Authority Exclusion (*e.g.*, *AUCC Update*, *ibid.*, at 10-11; Sauvé, above note 179, at 3).

Again, any conclusion that colleges and universities may meet the "not-in-competition" requirement becomes much more doubtful if the "one-way" interpretation of competition suggested in Section 5 of this study is not adopted by future WTO panels and competition by foreign and domestic private institutions with publicly funded Canadian institutions of higher education is sufficient to take the services of such institutions outside the governmental authority exclusion. Competition with public institutions of higher education is increasing as provinces permit the local operation of private for-profit universities and the activities of commercial training operations continue to expand. Alternatives to courses at publicly funded universities and colleges have proliferated. The development of internet-based programs and other distance learning techniques have enhanced the availability of higher education to Canadian residents.[367] Today, Canadian students have access to courses throughout Canada and around the world.[368] The degree of competition with publicly funded universities and colleges depends on a number of variables including the following: how broad is the relevant market; are on-line programs and in-person programs leading to identical or similar qualifications substitutes; and to what extent is a foreign university degree or college diploma a substitute for a Canadian one? In some cases, foreign qualifications from little known institutions in remote foreign jurisdictions may not be viewed as substitutes for Canadian qualifications, whereas qualifications from well known schools in the United States may be. As well, there may be competition for students for particular programs where supply exceeds demand, such as executive MBA programs, and not in others. Overall, the extent of competition by foreign and domestic private institutions with publicly funded Canadian institutions of higher education is hard to evaluate. Whether it rises to a significant level will depend on the circumstances of each case and is likely to change over time.

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[366] *Trends in Higher Education*, above note 201, at 35. In some universities, prices for education services to foreign students are set at a level that is only high enough to compensate the university for the fact that the basic per student grant that it receives for domestic students is not available, rather than at a level high enough to make profits.

[367] Virtual university education is available to Canadians over the Internet from both Canadian and foreign universities. Athabaska University is a Canadian institution offering Canadian degrees for studies over the Internet. Western Governors University is a similar virtual university located in the United States offering programs leading to US university degrees.

In summary with respect to higher education, both publicly funded colleges and universities supply their basic services on a not-for-profit basis. Colleges also operate under extensive state control and thus their services may be found not to be supplied on a commercial basis. In the case of universities, the degree of government control might not be sufficient to bring their services within the exclusion. The increasing variety of for-profit activities in which universities and colleges are engaged is likely subject to the GATS but, so long as these services are separate from their core teaching and research activities should not prevent the governmental authority exclusion from applying to their core activities, assuming that it would otherwise be available. With respect to the second requirement of the governmental authority exclusion, publicly funded universities and colleges do not, for the most part, appear to operate their programs in competition with each other or with private institutions, though further enquiry is needed in this area to confirm this conclusion.

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[368] Industry Canada - Commercial Education, above note 12, at 3.

Commercial Training

Commercial training operations, such as language schools, student tutoring businesses, and skills training firms, even if they operate on a not-for-profit basis, are not within the governmental authority exclusion. As a consequence, the measures of Canadian governments affecting commercial training are subject to the GATS. For the most part, commercial training services are not services with respect to which the state has a role in delivery. Service suppliers decide whether and when to provide their services and on what terms with little or no state involvement in most cases. In this sense, they operate on a commercial basis. It is also likely that they compete with each other, at least when they operate on a for-profit basis.

In the case of apprenticeship programs, the state is extensively involved in setting and administering program requirements. Where apprenticeship training services are offered by publicly funded colleges on a not-for-profit basis, there is a high probability that the exclusion would be available. As discussed in the preceding section, the services of colleges are likely within the governmental authority exclusion. The more extensive state involvement in their apprenticeship training programs simply confirms this conclusion in relation to these services. Where the services are offered by private for-profit firms, the exclusion would not apply. Even if the degree of government control were sufficient to satisfy this aspect of the governmental authority exclusion, profit making by services suppliers would prevent the exclusion from applying to their apprenticeship training services. In contrast, if state involvement in the delivery of apprenticeship programs did meet this aspect of the "not-on-a-commercial basis" requirement, apprenticeship training by not-for-profits that do not engage in competition would fall within the exclusion and be outside the GATS.

These conclusions regarding the availability of the exclusion would change to the extent that colleges and other not-for-profit suppliers of apprenticeship training as well as for-profit firms seek a limited number of government-funded apprenticeship positions. In these circumstances, they may be engaged in competition with each other with the result that the governmental authority exclusion would not be available to any providers of apprenticeship training. Equally, if the "one-way" meaning of competition suggested in Section 5 of this study is not adopted, then the presence of for-profit suppliers of competing services means that all apprenticeship training programs will be subject to the GATS.

Individual Education Services Suppliers

Teachers, professors and other individual suppliers of education services typically work as employees of public or private educational institutions, though some carry on business as independent consultants. The services they supply directly to consumers as individual consultants, such as individuals who offer tutoring services, are supplied on a commercial basis because they are paid compensation in excess of their costs of supply, generating profits. They are in position to compete with each other because they receive the economic rewards associated with delivering the service based on the amount they supply and it is likely that competition exists. As such, their services would be outside the governmental authority exclusion and subject to the GATS.

The services of education professionals who are employees would also appear to be outside the exclusion on the basis of the criteria developed in Section 5. Nevertheless, measures relating to such employees would not likely be affected by the GATS. Measures affecting individuals seeking access to the employment market in Canada or regarding employment on a permanent basis are excluded from the application of the GATS under the terms of GATS Annex on the Movement of Natural Persons.[369] Measures relating to individuals who enter Canada on a temporary basis to provide services on contract or to work at the Canadian premises of a foreign education services business located here would be subject to the Agreement.[370]

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[369] The Annex on the Movement of Natural Persons is discussed in note 352 above.

[370] The impact of this obligation is minimal, however, because Canada has no national treatment or market access obligations to individual suppliers

(c) Social Services

Employment Insurance, the Canada Pension Plan and Old Age Security and the social assistance programs in each province and territory fall squarely within the governmental authority exclusion as defined in the Annex on Financial Services. Each is a "statutory system of social security or public retirement plan" within the meaning of the Annex. Each is created under a distinct statutory regime to fulfill an important public purpose and is administered entirely by the state. As a consequence, they meet this first requirement for the governmental authority exclusion under the Annex.[371]

The second test under the Annex is whether Canada allows any of these activities to be conducted by private financial services suppliers in competition with the responsible public entity. With respect to employment insurance the answer must be no because, while there is no legal impediment to private sector insurers providing insurance against the risk of unemployment, in no sense could such services be considered to compete with the federal EI program that is mandatory and universal. Even if such private insurance services were offered, an individual could not choose to rely on such private insurance in place of participating in Canada's Employment Insurance program.

While private service suppliers provide pension services, they do not compete with the Canada Pension Plan. Because contributions to the CPP are mandatory, there is no way in which other suppliers of pension services can compete for the pension investments paid into the plan.

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of education services. Indeed, as discussed in Sections 3 and 7 in more detail, Canada has no sector specific obligations to any supplier of health and education services subject to the GATS.

[371] As well, there can be no doubt that these services are not provided on a commercial basis, though this requirement does not apply to the interpretation of the governmental authority exclusion under the Annex on Financial Services. It would become relevant if the exclusion of these services from the GATS was determined under the governmental authority exclusion as defined in GATS Art. I.3(b) and (c).

With respect to Old Age Security and social assistance, these programs do not compete for individuals to provide benefits to, but simply provide benefits upon specific eligibility criteria being met. The nature of these programs precludes competition and so they are not subject to the GATS

(d) Summary

On the basis of the foregoing, the governmental authority exclusion would appear to carve out all the social services examined and public health insurance from the application of GATS disciplines. The exclusion would also apply to "public" hospitals and public schools providing primary and secondary education, so long as the "not-in-competition" requirement of the exclusion means only that these service suppliers do not engage in competition, rather than an absence of competition with these health and education services.

On the other hand, most services of health professionals as well as privately supplied nursing home, old age home, home care and other health services in Canada would appear to be outside the exclusion. Similarly, most services of individual education professionals as well as private schools and commercial training services likely are subject to GATS disciplines.

The situation with respect to the services of publicly funded universities and colleges is less clear. Both types of institution provide their core services on a not-for-profit basis. As not-for-profits, they may not seek to compete with others in providing their services. Nevertheless, only colleges may operate in a manner that is sufficiently under government control such that their services would qualify as not being offered on a commercial basis. Thus, the services of colleges are unlikely to be found to be subject to the GATS. By comparison, the services of universities are more likely to be found to be subject to the GATS, though no firm conclusion was reached in this regard.

Many hospitals, universities, colleges and schools offer some services on a for-profit basis that would be outside the governmental authority exclusion. This study has concluded that these services should be treated as separate services, distinct from core not-for-profit activities. Admittedly, in practice this may be a difficult distinction to draw. It may be hard to assess the extent to which measures relating to hospitals, universities, colleges and public schools generally are subject to the GATS because they have an impact on for-profit services that are subject to the Agreement.

These conclusions regarding the scope of the governmental authority exclusion cannot be considered definitive. They depend upon the adoption of the interpretation of the governmental authority exclusion developed in this study. No WTO dispute settlement panel to date has considered how this provision should be interpreted. If the suggested "one-way" interpretation of competition were not adopted, it is conceivable that most services of hospitals, public schools, universities and colleges would be subject to the GATS. As well, the characterization of government measures, services delivery and funding does not and cannot account fully for the diverse and evolving nature of government regulation and marketplace activity in the areas of health, education and social services. In some cases, the generalizations regarding the manner in which services are delivered and regulated and, as a result, these conclusions regarding the application of the GATS may not apply.

In the following section of this study, the impact of the application of the GATS to services subject to the Agreement is explored. As discussed in detail below, even for those aspects of health and education services that are subject to the GATS, the Agreement provides no apparent basis for a challenge to the manner in which they are currently delivered or the schemes by which they are regulated.

7. What is the Effect of the GATS on Health, Education and Social Services in Canada?

(a) Introduction

The conclusion that the governmental authority exclusion is not applicable to some health and education services and that, as a result, they are subject to the GATS is only the first step in determining what impact the GATS might have on the regulation and delivery of health and education services in Canada. The consequences of the application of the Agreement remain to be determined.

As a preliminary matter, the impact of the GATS is limited by the scope of the Agreement and Canada's specific commitments. For the sub-set of health and education services found to be subject to the Agreement in Section 6 of this study, GATS obligations only apply to government measures that affect trade in these services through the four modes of supply contemplated by the Agreement. Government measures that do not affect trade in services are outside the scope of the Agreement. As well, government measures relating to health or education services subject to the Agreement are not constrained by the higher sector-specific obligations of the GATS, including national treatment, market access and GATS rules imposing disciplines on domestic regulation, because neither health nor education services have been listed by Canada in its national schedule of commitments.

The analysis below looks at the key obligations that apply to all services sectors subject to the GATS, notably, MFN and the obligations on monopoly service suppliers as they may relate to those aspects of health and education services subject to the Agreement. As well, Canada's specific commitments in insurance are discussed. While this study found in Section 6 that our system of public funding for health services under the *Canada Health Act* is outside the scope of the Agreement, new measures to extend public funding to aspects of health care currently insured by private sector insurers may conflict with Canada's GATS commitments relating to insurance. The possible impact of GATS commitments in research and computing services for publicly funded education services providers supplying these services is also addressed.

(b) The Effect of Obligations that Apply to All Sectors Covered by the GATS

Most Favoured Nation (MFN)

Introduction

For government measures affecting services sectors that are outside the governmental authority exclusion and subject to the GATS, Canada must comply with the MFN obligation. A measure that treats services or service suppliers[372] from any WTO Member country less favourably than it treats a like service or service supplier from any other country breaches the MFN obligation. The core of the MFN obligation is a prohibition on discriminating between foreign services providers. It was beyond the scope of this general study to undertake an exhaustive review of the regulatory schemes governing nursing homes, commercial training, and private schools and other health and education services subject to the GATS to identify possible cases of discrimination contrary to MFN. In the course of the research conducted for this study, however, no example of such discrimination was found. In many cases, once a government has decided to permit foreign private participation, there will be no policy rationale for any such discrimination.[373]

In the following sections, some general observations are presented regarding the implications of the MFN obligation on the effective provision by Canadian governments of health and education services subject to the Agreement and on the basic features of the Canadian regulatory structure governing them as described in Section 4 of this study. Although there is some uncertainty regarding the scope of the MFN obligation, it does not pose any obvious threat to existing schemes of delivery or regulation for the services that may be subject to the GATS including the current regimes for licensing and regulating nursing homes and other long-term care facilities, home care providers, private schools, universities and colleges, commercial trainers and health and education professionals. The GATS MFN obligation constrains the development of new rules in ways that seem likely to be modest and of limited practical importance in most cases.[374] The obligation will become more significant as foreign participation in the health and education sectors grows.

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[372] The MFN standard refers to the treatment of both services and service suppliers. Sometimes, for simplicity, in analyzing the scope of the obligation both services and service suppliers are not referred to in this section. The obligation, however, extends to both. It is not clear what difference this makes to the scope of the MFN obligation. Some commentators suggest that it makes no difference (*e.g.*, A. K. Abu-Akeel, "The MFN as it applies to Service Trade: New Problems for an Old Concept" (1999) 33 J. World T. 103 [*Abu-Akeel*], at 109-110).

[373] This is acknowledged by some critics of the GATS. In relation to the regulation of foreign private home care providers, for example, Sanger suggests that it is unlikely that a Canadian government would engage in such discrimination (Sanger, above note 5, at 104).

Nevertheless, going forward, Canadian governments will have to take the MFN obligation into account in relation to certain kinds of policy measures. For example, governments considering giving advantages, such as subsidies, to a particular foreign service supplier will have to consider whether the MFN obligation requires that other service suppliers from other WTO Members receive no less favourable treatment and what consequences this might have in the circumstances.

Impact of MFN Depends on Market Access for Foreign Firms

The MFN obligation only imposes obligations once foreign suppliers are permitted to provide services to Canadians and creates a greater practical concern when Canadian market access is actually gained by foreign suppliers. This study has not undertaken a systematic assessment of the degree of foreign activity in services sectors subject to the GATS. In part, this is because in the course of the research for this study few data were found on the actual level of foreign participation in many of the areas in which private firms may operate, like nursing homes, commercial training and private schools. In general, however, foreign participation in the delivery of health and education services in Canada appears to be low. So long as foreign participation is not permitted, MFN is not a concern. Where it is permitted but remains non-existent or insignificant, the practical likelihood that any WTO Member would challenge an existing Canadian government measure that discriminates between foreign suppliers from different countries contrary to MFN is likely to be small.

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[374] Johnson, above note 260, concludes that the MFN obligation will have a "minimal effect on Canada's health care system" (at 19). Other commentators have concluded that, in general, the MFN obligation will not have a significant impact in relation to public services (*e.g.*, Krajewski, Mapping, above note 251, at 359; Luff, Domestic Regulation, above note 262, at 193). Some commentators have come to different conclusions (*e.g.*, Sanger, above note 5). Even critics of the GATS, however, acknowledge that the MFN obligation leaves Canada with "a considerable degree of policy flexibility" (*e.g.*, Grieshaber-Otto and Sanger, above note 7, at 104).

Reforms which permit foreign market entry in a manner consistent with MFN may well result in increased levels of foreign participation in the Canadian market. MFN requires that services and service suppliers from WTO Member states receive no less favourable treatment than any like foreign service or service supplier allowed to enter the market. An uncontrolled and substantial increase in foreign market participation is not, however, an inevitable consequence of the MFN obligation. At the time that governments open up domestic markets to foreign competition, restrictions may be placed on the extent of market entry. As a result, a government considering policy changes to give access to foreign service suppliers or to grant preferential access to particular foreign suppliers in the areas of health and education services subject to the GATS should take into account the extent to which their market-opening initiative might result in higher than desired levels of foreign participation and, in light of this risk, to determine if MFN-consistent restrictions on market access should be imposed at the same time that foreign market entry is permitted. Failing to do so will not prevent governments from deciding subsequently to exclude foreign suppliers from the market but, as discussed below in this section, substantial foreign entry may complicate government efforts to do so. Having to deal with foreign suppliers in the market, however, is largely a result of the government's market-opening policy, not the MFN obligation.

Preferences under Other Trade Agreements Permitted

As noted above, any preferences accorded under economic integration agreements within the meaning of GATS Article V are not subject to the MFN obligation. So, for example, preferences in favour of services and service suppliers from the United States and Mexico under the North American Free Trade Agreement[375] that would otherwise be contrary to the MFN obligation cannot be challenged under the GATS.

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[375] *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T. S. 1994, No. 2, 32 I.L.M. 289 [*NAFTA*].

What Restrictions are Imposed on Regulation?

Impact of Provincial Measures in other Jurisdictions – One concern regarding the MFN obligation is that it means that a measure put in place by a provincial, territorial or local government to permit the supply of a service by a foreign service supplier within that government's territorial jurisdiction may trigger an obligation for Canada to ensure the same degree of access in other jurisdictions across the country.[376] Widespread experimentation by some Canadian governments with privatization possibly leading to foreign participation in health services delivery, such as Alberta's legislation permitting private, for-profit surgical facilities, has made this a significant worry.

There is, however, no basis for this concern. Provincial and state measures have been considered in cases decided under the GATT dealing with the national treatment obligation.[377] Where these measures were found to be inconsistent with national treatment, rules in other state or provincial jurisdictions were not affected. Most commentators considering the application of the MFN rule in the GATS context have concluded that the same approach would be applied.[378] MFN would only be breached where a measure of a Canadian government treats foreign service suppliers from a WTO Member less favourably than it treats service suppliers from another state or states. If one province permits foreign service suppliers to operate within the territory of the province that province cannot treat service suppliers from any WTO Member less favourably. Measures in other Canadian jurisdictions that do not permit foreign suppliers to enter their local markets are not subject to challenge. Nothing in their measures would constitute discrimination contrary to the MFN obligation.

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[376] Sanger, above note 5, recites essentially the same argument in relation to the national treatment obligation (at 95). Similarly, in his analysis of the application of the national treatment obligation in NAFTA, Shrybman argues that if Canada were to accept a move by Alberta to permit private clinics to provide hospital services, the national treatment obligation may mean that all Canadian jurisdictions would have to permit foreign private clinics (Shrybman Opinion, above note 11).

[377] *E.g.*, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, 18 February 1992, DSA 17/R, 39A/27, <http://www.wto.org/english/tratop_e/dispu_e/91alcoho.wpf> (date accessed November 25, 2003); *United States – Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, DS23/R, 39/S/206), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/91alcohm.wpf> (date accessed November 25, 2003).

[378] *E.g.*, Gottlieb & Pearson, in "Legal Opinion: GATS Impact on Education in Canada" (2001), online: Canadian Association of University Teachers http://www.caut.ca/english/issues/trade/GATS%20Impact.pdf (date accessed May 15, 2004), at 16; *AUCC Update*, above note 206, at 12-13.

As a result, if Alberta were to permit foreign for-profit surgical facilities to provide the same health services that are offered in "public" hospitals in Alberta, the MFN obligation would not require other Canadian governments to permit such facilities to operate in their jurisdictions on the same terms or at all. Canada would be obliged to ensure that Alberta treated other foreign providers of the same surgical services no less favourably than those that it has permitted to operate in the province. Canada would not have to ensure that Alberta actually grants access to its market to other foreign suppliers. Alberta may employ the same criteria for entry into its market that it used for those foreign suppliers it has already allowed into the market. Alberta could also impose non-discriminatory market access restrictions, such as a limit on the total number of service suppliers that applies to all foreign and domestic surgical facilities.[379]

The failure of the federal government to ensure that the same rights granted to foreign surgical facilities in Alberta are accorded to foreign firms seeking to provide the same services in other Canadian jurisdictions would not be a breach of the MFN obligation. Even if the case could be made that inaction by the federal government in response to Alberta's change in policy constituted a measure endorsing the change, it would only consist of a measure approving the change in Alberta. In order for the

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[379] Alberta would have to ensure that any such measure did not discriminate in fact between the incumbent foreign firms and prospective new entrants contrary to the MFN obligation. This might be done by auctioning off the right to be one of the limited number of permitted firms. As well, it would be consistent with GATS for Alberta to decide subsequently to exclude all foreign suppliers from the province. This alternative is discussed in more detail below. See below notes 382-389 and accompanying text.

MFN obligation to require the same access to other Canadian provinces or territories, it would be necessary to demonstrate that a new national standard had been created under which foreign firms were entitled to access to the market across the country.

Regulatory Standards – Neither the MFN obligation, nor any other applicable obligation in the GATS, limits the ability of the state to put in place and to enforce standards for competence and other aspects of quality in the delivery of the health and education services subject to the GATS. The services standards for nursing homes and competency standards set for health professionals, for example, could not be challenged.[380] Article VI of the GATS does set some standards for domestic regulation but the substantive obligations only apply to services in listed sectors, which do not include health or education. As recognized in the preamble to the GATS, Canadian governments are free to regulate to ensure that Canadian public policy objectives are met. So long as government measures do not treat services or service suppliers from a WTO Member state less favourably than those from any other country, the MFN obligation is complied with.

An example may serve to illustrate this point. Alberta has permitted DeVry Institute of Technology, a for-profit organization held by a publicly traded U.S. company, to operate a campus in Calgary with the authority to grant university degrees. This does not mean that Alberta is obliged to permit any other U.S. or foreign institution to operate in Alberta without meeting the same requirements that it imposed on DeVry regarding academic standards or otherwise. There is no obligation on Alberta to ensure that these requirements are the same as the standards imposed on domestic institutions, because Canada has no national treatment obligation in relation to higher education services.

It is also clear that the MFN obligation not to discriminate does not diminish Canada's right to choose whether to recognize the education or experience obtained or licenses or qualifications granted in a particular country. Where Canada has granted recognition with respect to such attainments acquired in a particular country by health or education professionals, it is not bound to recognize similar attainments acquired in WTO Members. Canada is required only to give WTO Member countries an adequate opportunity to negotiate for recognition on a comparable basis.[381] As well, Canada cannot grant recognition in a way that would be discriminatory or a disguised restriction on trade.

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[380] Sauvé, above note 179, at 16; Organization for Economic Co-operation and Development, *GATS: THE CASE FOR OPEN SERVICES MARKET* (Paris: OECD, 2002), at 65-69.

Ability to Withdraw Market Access for Foreign Suppliers – Some commentators have suggested that the application of the MFN obligation means that if a government privatizes a state-run service or otherwise changes its rules to permit foreign firms to provide the service, the government's ability to decide subsequently to deliver that service directly through the state or to restrict service supply to Canadian firms is substantially diminished.[382] Potentially, this could be an important consideration for governments because experiments with market opening reforms of this kind in other countries, at least in health care, have often been followed by subsequent rounds of reforms to correct for problems arising with initial internal market reforms.[383] Fortunately, no such "one-way street" effect of privatization and liberalization initiatives results directly from the operation of the GATS obligations.[384]

That is not to say that privatizing a public service would have no effect under GATS. If a government-provided service was excluded from the application of the GATS by the governmental authority exclusion, such an initiative could remove the service from the protection of the exclusion. Where the result of a privatization program is that the service is provided by for-profit service suppliers, without state involvement in delivery of the service or in competition with each other, the exclusion would no longer be available and the GATS, including the MFN obligation, would apply. So, for example, if changes to the *Canada Health Act* and provincial health schemes were adopted to force "public" hospitals to compete with each other and with private hospitals for government funding, the exclusion would cease to apply to hospital services.

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[381] See GATS Art. VII, and above note 34-36 and accompanying text, regarding Canada's obligations with respect to recognition.

[382] *E.g.*, Scott Sinclair, a prominent critic of GATS, has written that the MFN obligation "has the potential to forcefully consolidate commercialization and privatization involving foreigners" in S. Sinclair, *The GATS and Canadian Postal Services* (Canadian Centre for Policy Alternatives, 2001), at 23. See the similar language used by Grieshaber-Otto & Sanger, above note 7, at 39 and 91.

[383] Epps & Flood, above note 97, discuss several other specific types of market reforms which involve foreign private participation and the frequent need for a second round of reforms.

[384] As noted at the outset, this study is only concerned with the GATS. It does not deal with "one-way" street arguments relating to other trade agreements, including NAFTA (above note 375), which imposes more comprehensive obligations for the benefit of US and Mexican investors in Canada.

Nevertheless, unless Canada were to list health or education services in its national schedule of commitments, Canada has no national treatment or market access obligation in relation to such services, and so Canada remains free to change policy direction following a privatization or liberalization to exclude foreign suppliers of health and education services. Canada could either provide the service directly through the state or put in place a regime restricting the market to Canadian suppliers. As a political matter, ousting all private suppliers or all foreign suppliers from some segment of the marketplace undoubtedly would be difficult, but that is not a problem attributable to Canada's existing GATS obligations. The MFN obligation does not guarantee any level of market access.

The adoption of policies that permit foreign market entry in a manner consistent with MFN may result in fact in increased levels of foreign participation. Presumably this would be one of the main objectives of the market opening policy. It is also true that the higher the level of participation by foreign suppliers in the Canadian market, the more difficult it would be to exclude them.[385] As noted above, however, an uncontrolled and substantial increase in foreign market participation is not an inevitable consequence of the MFN obligation. GATS-consistent restrictions on foreign market entry may be put in place. The failure to do so may lead to unexpectedly large increases in foreign participation in some cases, magnifying the political and other costs associated with future attempts to reverse market opening reforms. Any such cost increase is not caused by the MFN obligation, but rather by the government's market-opening initiative and its failure to anticipate the consequences of its action.

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[385] This argument is made by Sinclair & Grieshaber-Otto, above note 16, at 46-8.

The GATS might limit the options that are practically available to Canadian governments regarding how they implement a policy of excluding private sector foreign suppliers that have been permitted to enter the market to some extent. The significance of the constraint imposed on Canadian policy makers will depend on the circumstances, including the application of Canada's domestic expropriation law. Expelling foreign investors from the Canadian market could also raise issues under NAFTA[386] or the foreign investment protection agreements to which Canada is a party but these issues are beyond the terms of reference of this study.

Excluding private sector suppliers from a segment of the market is not a step which would be taken by a Canadian government without regard to the impact on the businesses affected, whether domestic or foreign. In particular, a government considering such a measure would have to take into account the possible obligation to compensate excluded suppliers under domestic Canadian expropriation law. All provinces and the federal government have in place statutes governing expropriation.[387] As well, Canadian courts have imposed an obligation on the state to compensate for the taking of property in some cases of government action, even in the absence of an express obligation on the part of the state to pay compensation under applicable legislation. The circumstances in which compensation must be paid are not easy to specify in the abstract. Generally, for an expropriation to result in a compensation obligation under Canadian law, there must be some transfer of a physical asset or goodwill to the state.[388] Canadian courts have not always ordered compensation even when a government action has had the effect of precluding a private business from continuing to operate.[389] In one case where a government had granted a right to provide home care service to a private firm, for example, the government's subsequent decision to revoke that right and to provide the service itself was found not to trigger an obligation to compensate the firm. Whether a particular government action constitutes a compensable expropriation under Canadian law will depend on the nature of the measure and the circumstances in which it is enacted. Where a government decides that it will supply a service directly or require it to be supplied by Canadian not-for-profit suppliers, it might be that no compensation obligation would be triggered.

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[386] Above note 375.

[387] These statutes are discussed in E.C.E. Todd, *THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA* 2d ed. (Toronto: Carswell, 1992), at 2-17.

Nevertheless, if a government wanted to avoid any possible expropriation obligation but still return to delivery of the service by the state or by Canadian not-for-profit suppliers, the GATS could have an effect on the use of one method for doing so. For example, imagine that, in the past, a province had allowed foreign for-profit surgical facilities to supply services in the province, but has now decided that it wants to return to a regime under which only publicly funded, not-for-profit hospitals are the providers of surgical services. If the government were to revoke the right of any foreign suppliers to provide the service, inevitably it would face complaints from such suppliers and perhaps their governments, along with possible domestic law expropriation compensation obligations. In such a situation, the government might decide to grandfather existing foreign and domestic service suppliers that had entered the market in order to avoid such complaints and obligations. The preference accorded to the incumbent foreign firms by allowing them to continue to operate in the market might breach the MFN obligation in some cases. To the extent that GATS MFN obligation limits the use of grandfathering, it may constrain the policy flexibility of Canadian governments in these circumstances.

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[388] See R. Deardon, "Arbitration of Expropriation Disputes between an Investor and the State under the North American Free Trade Agreement" (1994) 28 J. World Trade 113, at 117-120.

[389] *Home Orderly Services Ltd.* v. *Manitoba* (1987), 49 Man. R. (2d) 246 (C.A.). In this case, the Manitoba Court of Appeal rejected a claim for compensation from a private provider of home care services arising out a decision of the provincial government to provide the service itself, effectively putting the private provider out of business. The court held that because the private provider had only been able to provide the service because of the government's prior decision to contract out the provision of home care services, there was no basis for a claim to expropriation.

It is possible, however, that a return to public delivery of the service could be structured so as to avoid an MFN breach. It may be that a cap could be placed on foreign market participation that would be MFN consistent. If the province were to auction off market entry to a limited number of foreign firms, and participation in the auction was not restricted to incumbent firms, it is likely the MFN obligation would be complied with.

In summary, Canadian governments at all levels contemplating a measure affecting access to a local market by foreign suppliers must take the MFN obligation into account. They must be aware of their obligation not to enact measures that discriminate between foreign suppliers of like services. This imposes a burden on decision makers in the federal government, the provinces, municipalities, government agencies and non-governmental bodies exercising authority delegated by the state. Nevertheless, because these decision makers remain free to decide whether to permit foreign entry into the market, to control the level and nature of market entry and, if they do grant them access, to exclude them subsequently subject to possible constraints on grandfathering incumbent foreign firms in some circumstances, the overall impact of the MFN obligation on what policies are adopted would seem to be small.

Subsidies – Canada has unrestricted freedom to subsidize services that are carved out of the GATS by the governmental authority exclusion, such as those provided by hospitals and public schools. For services subject to the GATS, there are no specific disciplines applicable to subsidies. Nevertheless, subsidies are government measures subject to the rules of general application in the GATS, including MFN. As with any other measure, any subsidy granted to a foreign service or service supplier must be available on no less favourable terms to like services and service suppliers from any WTO Member country. Canada could not give a subsidy to a German supplier of commercial training services and give less favourable treatment to a Japanese supplier of like services.

One of the concerns expressed by critics of GATS in relation to subsidies is that the MFN obligation not to discriminate applies across modes of supply.[390] They worry that a government subsidy for one mode of supply, such as the delivery of commercial training services by a foreign supplier through a local commercial presence in Canada, may have to be extended to other suppliers, even including those outside the country who supply commercial training through other modes, such as over the Internet or even at their facilities abroad. An example may help to illustrate this concern. Assuming that in-person university courses offered by University of Phoenix operating through a commercial presence in British Columbia granting U.S. degrees are like university courses leading to the same undergraduate qualification offered by Western Governors' University on the Internet from a location in the United States, would Canada be obliged to ensure that any subsidy that British Columbia decides to give to the University of Phoenix in relation to its operations in Canada is extended to Western Governor's University as well?

The same issue arises with respect to whether the national treatment obligation could be interpreted to require that all subsidies to domestic businesses operating in sectors listed in a Member's national schedule of commitments be provided on no less favourable terms to foreign suppliers outside the country. The WTO Secretariat has stated that the GATS national treatment obligation does not require the payment of subsidies to suppliers outside the national jurisdiction. This position has been endorsed by the Members of the WTO through the Council on Trade in Services in the *Guidelines for the Scheduling of Specific Commit-*

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[390] *E.g.*, Sanger, above note 5, at 96-7. Gauthier suggests that the extent to which subsidy obligations apply across different modes of supply is a "crucial question" (Gauthier, above note 65, at 121).

ments under the General Agreement on Trade in Services.[391] The Guidelines themselves state that they should not be considered a legal interpretation of the GATS, and the interpretation suggested does not have any clear basis in the language of the GATS.[392] Nevertheless, the endorsement of this interpretation by the WTO Council for Trade in Services is likely to encourage a WTO panel and/or the Appellate Body to adopt it. If it were adopted in the national treatment context, it is likely that the same interpretation would be applied in the construction of the MFN obligation. Consequently, a conclusion that Canadian government subsidies related to the subset of health and education services subject to the GATS would have to be given to all service suppliers from WTO Members who offer like services to Canadians on the same basis as subsidies are given to foreign service suppliers operating through a commercial presence in Canada must be considered far-fetched. Several additional points may be made in support of this conclusion.

First, any such obligation would only arise if the services delivered remotely or the service suppliers were like the services delivered locally or by the local suppliers. As noted below, a specific analysis would have to be done of each situation. It is not necessarily the case that services delivered through different modes will be found to be like.

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[391] WTO, Council on Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, adopted 23 March 2001, S/L/92 (updating NTN.GNS/W/164, as modified by 164/Add.1 and S/CSC/W/19), at para. 10. The Guidelines indicate that they should not be considered a legal interpretation of the GATS (at 1). In the recent *Mexico – Telecommunications* case, above note 37, a WTO panel indicated that the Guidelines could be looked to as confirmation of an interpretation of Mexico's commitments in its schedule.

[392] The only provision of the GATS which would seem to be relevant is footnote 12 to Article XXVI(g) which provides that a supplier supplying a service through a commercial presence, such as a branch office, must be granted the treatment required to be accorded under the GATS but that there is no obligation to extend that treatment to any other parts of the supplier located outside the territory where the service is supplied. This would apply to subsidies as well as all other measures. While this provision indirectly supports the interpretation advanced in this study, it does not directly address whether the GATS imposes an obligation to pay subsidies to suppliers operating in other modes.

Second, and more important, such an obligation would potentially involve enormous, even unlimited, financial commitments on the part of a government. The fact that no WTO Member has included an MFN exemption in its national schedule of commitments to avoid this drastic, and arguably absurd, consequence suggests that it would be contrary to the Members' intentions and a dispute settlement panel would likely recoil from interpreting the MFN obligation to impose such a burden.[393]

Finally, it must be regarded as improbable that a state would initiate a challenge to a domestic subsidy practice of another Member if the result could be that all of its own subsidies had to be extended on an MFN basis to suppliers of like services wherever they were located. On balance, the risk that MFN may be interpreted to require the payment of subsidies to foreign services suppliers located abroad seems remote.

Exclusion for Government Procurement – In accordance with GATS Article XIII, the MFN obligation, as well as the national treatment and market access obligations, do not apply to

> laws, regulations or requirements governing procurement by government agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.[394]

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[393] Even GATS critics acknowledge that such an interpretation of the MFN obligation may seem "far-fetched" (*e.g.*, S. Sinclair, *GATS: HOW THE WORLD TRADE ORGANIZATION'S NEW 'SERVICES' NEGOTIATIONS THREATEN DEMOCRACY* (Ottawa: Canadian Centre for Policy Alternatives, 2000), at 86-87 and Sanger, above note 5, at 97). Nevertheless, the same critics suggest it is required by the logic of the GATS. If such an interpretation were adopted in relation to national treatment, all subsidies to domestic businesses would be subject to an obligation to provide no less favourable treatment to foreign suppliers outside the country. No WTO Member has sought to protect itself against such a drastic consequence by a limitation on its national treatment obligation.

[394] While Canada is a party to the WTO Agreement on Government Procurement, its obligations do not extend to health, education or social services. Health and social services are expressly excluded. As well, Canada's obligations only include procurement by the federal government and Canada has limited its obligations to services for the direct benefit of government, which would appear to exclude all services delivered to individuals.

Measures relating to services in the health and education sectors that are subject to the GATS on the basis that the governmental authority exclusion does not exclude them are, nevertheless, not subject to the MFN obligation if they are found to be measures relating to government procurement within the meaning of this provision. Acquisitions of services by government entities providing health or education services, such as public schools for example, for their internal use would be exempted from the MFN obligation under this provision.

It is not likely, however, that government-funded delivery of health or education services by private service suppliers to individuals could be considered to be government procurement. It is true that such services are not for commercial resale nor will they be incorporated into services for commercial resale as contemplated by the government procurement carve-out. Nevertheless, it is doubtful that the reference to "government purposes" is sufficiently flexible to include activities that are fully paid for by the state but supplied to individuals, such as basic physician services. An unusually broad interpretation of the procurement exclusion would have to be adopted to encompass services not directly consumed by government.[395] It is even less likely that services that are only subsidized by the state, like home care, and university education, could constitute government procurement.[396] Because the exclusion for government procurement appears to be inapplicable, Canadian governments would not be able to rely on the blanket protection from the application of the MFN obligation that it provides in relation to most measures affecting health and education services subject to the GATS.[397]

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[395] The GATS language is more flexible in this regard than other trade agreements, however. In NAFTA, above note 375, services provided to persons are expressly excluded (Art. 1001.5(a)).

[396] Jackson & Sanger, above note 8, characterize the meaning of this expression as an "ongoing matter of debate" (at 153). The uncertainty of the scope of the government procurement exclusion is also discussed in Sanger, above note 5, at 101-103.

[397] The exclusion for government procurement could be applicable to purchases by governments and government agencies of services.

Uncertainty Regarding When Services Are "Like" and the Scope of the MFN Obligation – The manner in which these key aspects of the MFN obligation will be interpreted is not yet clear. The MFN obligation only prohibits discrimination between foreign businesses supplying "like" services or that are "like" service suppliers. Because it is necessary to make an assessment of likeness, the precise impact of the MFN obligation will depend on the facts of each case. In determining the likeness of goods, WTO panels have focused on the attributes of the products and whether they are competitive substitutes in the market. It remains to be seen whether services that are substitutes in this sense may nevertheless be found not to be like for the purposes of the MFN obligation on other grounds. It has been suggested that where there is need to discriminate between services to achieve legitimate regulatory objectives, the services should not be found to be like,[398] but no WTO case has addressed this issue. As well, WTO panels have so far provided little guidance on what differences in treatment will result in less favourable treatment contrary to the MFN obligation.

Another example of the difficult questions regarding the scope of the MFN obligation in this regard is to what extent services delivered remotely, such as tele-health or internet-based training courses, will be considered to be like health and education services delivered locally on a face-to-face basis or otherwise. For example, are in-person university courses offered by the University of Phoenix operating a commercial presence in British Columbia like university courses leading to the same American undergraduate qualification offered by Western Governors' University on the Internet from a location in the United

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[398] Abu-Akeel identifies this as a difficult issue that is not capable of being resolved by WTO dispute settlement panels. He argues that this is an issue on which the Council on Trade in Services should issue guidelines (Abu-Akeel, above note 372, at 115). Matoo suggests that the MFN obligation should only be breached when differences in treatment cannot be justified as necessary to achieve a legitimate non-discriminatory policy objective (A. Matoo, "MFN and GATS" in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, T. Cottier & P. Mavroidis, eds. (Ann Arbour: Michigan, 2000)[*Matoo*], at 77-79.

States? Would remote diagnosis by a foreign radiology lab over the Internet from its location in the United Kingdom be like the same diagnostic services supplied by a Swiss-owned lab in Toronto?[399] The simple fact that services are delivered through different modes of supply does not necessarily mean that the services are not like.[400] Equally, in every case in which functionally similar services are provided through different modes, they will not necessarily be found to be like services. Also, whatever the answers may be to these questions today, the answers are likely to change over time with improvements in technology and increasing consumer comfort with new technology-enabled delivery methods. An examination of the circumstances of each case at the time an issue arises will be required.

Especially in the area of health services, the provision of services in different modes might be of some significance. One can imagine situations in which Canadian governments may seek to treat differently the delivery of services in different modes even though the services may be considered substitutes from a customer's point of view. In the example, above, ensuring that the British lab meets Canadian quality standards may be more difficult than ensuring that Swiss lab operating through a commercial presence in Canada does so. If the British lab fails to perform in accordance with Canadian quality standards, it may be harder for a Canadian regulator to detect non-compliance and impose sanctions. In these circumstances, a Canadian government may want to impose different and additional requirements on such a foreign service supplier before permitting its services to be provided in the Canadian market or to be paid for from government funds. Would the differences in treatment related to ensuring compliance with Canadian quality standards mean that the services or the service suppliers are not like?[401] If the services of the British lab and the Swiss lab were considered to be like, the imposition of different rules on like services would have to comply with the MFN requirement.[402] This would not mean that the requirements imposed on the British lab would have to be identical to those imposed on the Swiss lab operating in Canada. Canada would be obliged only to ensure no less favourable treatment of the British lab. How the MFN obligation would apply will depend on how likeness of services is determined and the specific nature of the differences in regulatory treatment.

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[399] Sanger, above note 5, at 104-105, discusses this issue in relation to home care.

[400] See above note 309, regarding the adoption by WTO panels of the principle of modal neutrality.

[401] Even if such a difference in treatment were found to be contrary to MFN, consideration would have to be given to whether the general exception

As a practical matter, the issue of whether the supply of services through different modes is like only arises to the extent that it is feasible for a foreign service supplier to deliver a service from outside the country. It is not feasible for many health services subject to GATS to be delivered remotely. While some diagnostic and other health services may be delivered over the Internet or other means of telecommunications, most aspects of home care, nursing home and old age home services, and the services of many health professionals can only be delivered in person. In these areas, the issue of whether services delivered in different modes may be "like" for the purposes of the MFN obligation may not be significant. With developments in technology, the categories of services that can be delivered remotely inevitably will expand.[403]

In contrast, most education services can be delivered from a remote location. Canadian measures currently restrict access of foreign service suppliers operating on-line to some segments of

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in GATS Art. XIV would be available to protect the measure. This exception extends to "measures … necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those related to … safety;…."

[402] It may be that differences in health-related risks encountered in services delivered on-line rather than in person would prevent the services being considered to be like for the purposes of the MFN obligation. Such an approach would be consistent with that adopted by the WTO Appellate Body in *EU – Asbestos*, above note 55, in determining whether asbestos was like other goods that posed less of a risk to health.

[403] In the *CCPA Report on Health*, above note 111, the provision of some home care services from abroad, such as the replacement of in-home visits with remote surveillance and monitoring is discussed (at 30).

the market. To date, no foreign on-line university has been permitted to grant Canadian degrees. Most apprenticeship programs must be delivered in person. In these areas, the issue of whether services in different modes are like does not arise. At least, it has not arisen yet. Other educational programs offered commercially may be available on-line, so the question might arise as to whether these services offered in different modes are nevertheless "like."

In limited circumstances, the uncertainty regarding the scope of the MFN obligation could complicate policy making for governments engaged in regulating services sectors in which there is foreign participation. In most cases, this uncertainty does not represent a practical constraint on Canada's ability to ensure that domestic standards are met. Regulatory objectives may be achievable with a single set of rules for foreign services suppliers. As foreign participation in the market for health and education services increases and offshore supply through technologically mediated delivery methods in direct competition with foreign suppliers operating from a business presence in Canada becomes more feasible and more widely accepted by consumers, this uncertainly regarding the scope of the MFN obligation might become a more significant issue in some cases. It is conceivable that Canadian regulators might seek to impose rules on remote foreign suppliers of a service to ensure that Canadian standards are met that are different from those imposed on local foreign suppliers. In the limited circumstances where this is found to have the effect of treating like services or service suppliers from different jurisdictions differently, the application of the MFN obligation will have to be considered. The extent to which services will be found to be like and what the MFN obligation requires if they are will depend on the approach to these issues adopted by WTO dispute settlement panels and the facts at the time the issue is considered.

Monopoly and Exclusive Service Suppliers

Monopoly service suppliers are subject to special obligations under the GATS. Where a monopoly service supplier in Canada competes in the supply of a service that is outside the scope of its monopoly rights and in a sector listed in Canada's GATS schedule, Canada must ensure that the monopoly supplier does not abuse its monopoly position. Abuse would include, for example, subsidizing its activities in the competitive market from monopoly profits. Canada is also obliged to ensure that its monopoly service suppliers do not act in a manner which is inconsistent with the commitments undertaken in Canada's schedule or the MFN obligation.[404] The monopoly service supplier obligations in Article VIII also extend to "exclusive service suppliers," meaning suppliers with respect to which Canada "formally or in effect (a) authorizes or establishes a small number of services suppliers and (b) substantially prevents competition among [them]." The obligations for monopolies and exclusive service suppliers likely do not apply to services delivered in the exercise of governmental authority because these services are excluded from the application of the Agreement altogether.

The most obvious, and perhaps the only, monopolies in the areas of health, education and social services are provincial and territorial health plans, but this study has concluded that the services of health plans are not subject to the disciplines of the agreement because they are excluded from the application of the GATS by the governmental authority exclusion. Even if they were not, the monopoly service supplier obligations would not impair the ability of provincial and territorial plans to operate as they currently do. If provincial and territorial plans were subject to the monopoly supplier obligations, they would be prohibited from competing with private insurers because Canada has listed health insurance services. As discussed above, however, under the current regime, private insurers do not compete with provincial and territorial health plans to insure that same services.[405] Nevertheless, the GATS could impose some constraints with respect to some kinds of changes to health plans. If a province decided to extend the coverage of its provincial health plan to services insured by private insurers, Canada may have to comply with the obligation to notify the WTO Council for Trade in Services of the policy change and, more importantly, possibly to provide compensation in the form of trade concessions under GATS Articles VIII.4 and XXI.[406] The application of GATS rules to such reforms to provincial and territorial health plans is discussed further in Section 7(c) of this study.

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[404] GATS Art. VIII.1. See above notes 37 and 49 and accompanying text.

[405] Johnson, above note 260, at 19. Sanger (above note 5, at 83-84) describes some recent activities of the Alberta provincial health insurance plan that appear to compete in a limited way by insuring services outside the *Canada Health Act*, above note 82.

It is unlikely that other kinds of public service providers could be characterized as monopoly service suppliers within the meaning of the GATS. The monopoly service supplier obligations in Article VIII, however, extend to "exclusive services suppliers," meaning suppliers, as explained above. Assuming for the moment that the services of publicly funded universities were subject to GATS obligations, could "exclusive service suppliers" embrace universities in a province?[407] In a province like Nova Scotia, for example, universities are established under acts of the provincial legislature and a limited number of universities (11) have been permitted to grant degrees. By requiring a limited number of institutions to operate as not-for-profit organizations, it may be that competition is substantially prevented among the universities.

Several strong arguments may be made in response. Nova Scotia is not an isolated market for the services of degree-granting universities. Students from Nova Scotia and elsewhere in Canada may consider that the services of other Canadian universities and indeed the services of some foreign universities are substitutes for the services of Nova Scotia's universities. The ability of Nova Scotia students to take courses leading to a degree on-line from Alberta's Athabasca University, among others, makes the claim that Nova Scotia is a distinct market in which the state has substantially precluded competition untenable. Even if Nova Scotia could be defined as the relevant market, 11 universities in a province with a total population of under 940,000 may not be considered a "small number" within the meaning of the GATS. In any case, there is always the possibility that, in fact, a WTO panel or the Appellate Body could conclude that there is competition between them. This example suggests that the case for finding that universities are exclusive service suppliers is weak. For those Canadian jurisdictions in which private universities are permitted, the case is weaker still.

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[406] These obligations are discussed above note 49 and accompanying text.

[407] The definition of monopoly service supplier is the sole supplier in "the relevant market of the territory of a Member" (GATS, Art. XXVIII(h)). The language of this definition suggests that a market should be defined in economic terms and may be less than the entire territory of a WTO Member.

If this conclusion is wrong and universities were found to be subject to these exclusive supplier disciplines, it would mean that university administrations would have to adopt a screen for decision-making reflecting their requirements. It is not clear, however, whether these possible restrictions on the commercial activities of universities would impose meaningful constraints on the way in which universities operate in practice. The extent of universities' commercial activities is not known. There is no research showing that universities engage in discrimination in commercial sales to foreign service suppliers in ways possibly contrary to the MFN obligation or that universities abuse their market power, such as by subsidizing their commercial activities where they compete with private suppliers in service sectors listed in Canada's national schedule of commitments, such as computer consulting, with funds generated by their degree granting activities.[408]

This discussion of the possible obligations of universities as exclusive service suppliers assumes that universities are subject to the GATS and that they would be found to be subject to the relevant obligations. Whether the governmental authority exclusion is broad enough to cover universities is somewhat unclear. The conclusion that they should not be treated as exclusive service suppliers is more firmly based and these obligations, whatever the possible practical implications, likely do not apply.

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[408] A concern that the application of the GATS rules on monopolies and exclusive service suppliers prohibit subsidies to universities that are engaged in contract research is expressed in *AUCC Update*, above note 206, at 14-15, 17. Since Canada has a limited commitment in research services and has scheduled a horizontal limitation preserving its freedom to subsidize research and development, there appears to be little basis for this concern. Canada's commitments in research are discussed below notes 429-431 and accompanying text.

(c) What is the Impact of Canada's Sector-Specific Obligations in its National Schedule of Commitments?

Commitments Regarding Services Purchased by Health, Education and Social Services Providers

As noted above, Canada has not made commitments in health, education or social services but has made commitments in some other sectors that may affect the conditions in which service suppliers in the health, education and social services sectors operate. Canada has made commitments in relation to services that may be purchased by, for example, schools, universities, hospitals and social services agencies in the course of their operations, such as various business services.[409] As discussed in Section 3 of this study, the effect of these commitments should be to increase the efficiency of health, education and social services providers. To the extent that Canada's commitments result in greater market access for foreign suppliers of such business services and foreign suppliers enter or expand an existing presence in these markets, the result should be more competition in these services sectors in Canada. In principle, foreign competition in the supply of these services will lower their cost to all services purchasers, including suppliers of health, education and social services. The delivery of core health, education and social services should not otherwise be affected by these commitments.

Some GATS critics, however, have raised concerns that Canada's national treatment obligation in relation to these specifically committed sectors would impose meaningful limitations on Canadian governments. It has been suggested, for example, that a regional health authority would be precluded by the national treatment rule from deciding to terminate the contracts of private food services to provide cafeteria services and hospital meals in favour of performing these services internally.[410] It is argued that the national treatment rule applies because food services purchased by health authorities and hospitals are included under Canada's specific commitment for "hotels and restaurants (including catering)" under "tourism and travel-related services" because the definitions in the associated Provisional CPC classification refer to catering and other food services.[411]

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[409] See above note 71 and accompanying text.

[410] *E.g.*, Sanger, above note 5, at 94-95.

This concern seems unfounded for several reasons. First, there should be no national treatment breach because Canadian private sector suppliers of food services would be equally affected by such a policy change. Second, even if, somehow, a national treatment breach would otherwise be found, Canada's horizontal limitation on its national treatment obligation preserving its freedom to "supply services in the public sector" would likely apply, such that no WTO Member could complain about any less favourable treatment of its services suppliers.[412]

This horizontal limitation does not extend to Canada's market access obligations. Nevertheless, self-provision of services should still be safe from a GATS challenge. It is not clear how self-provision could constitute a restriction on market access. In any case, even if, somehow, it were possible to characterize self-provision of a service as a restriction on market access within the meaning of GATS Article XVI, decisions by a regional health authority or any other Canadian government agency regarding the acquisition of food services likely would be exempt from the market access obligation on the basis that they relate to government procurement.[413] All such decisions would be exempt from the MFN and national treatment obligations as well.

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[411] Provisional CPC, above note 38. This argument is made in Sanger, above note 5, at 91, and Jackson & Sanger, above note 8, at 92-3. This interpretation of the scope of Canada's specific commitments is not free from doubt. Food services supplied to hospitals, schools and universities have nothing to do with tourism. The related CPC categories, however, do not restrict food services to those in connection with tourism. If not included under Canada's commitments relating to tourism, such services would be included in the residual category of "other services not included elsewhere" with respect to which Canada has no specific commitments.

[412] "Public sector" is not defined. It is possible that hospitals would not be considered part of the public sector since they are not institutionally part of the state, in which case the limitation would not apply.

Critics of the GATS have argued also that Canada's commitment for building cleaning services represents a commitment relating directly to an aspect of home care services.[414] Assuming that Canada's commitment does extend as far as cleaning services provided to individuals in connection with home care services, measures dealing with the provision of cleaning services in this context could raise issues under GATS in limited circumstances. For example, if a provincial government restricted the provision of publicly funded home care, including cleaning services, to not-for-profit corporations, the measure could be considered to be inconsistent with Canada's market access obligation not to require a specific legal form as a condition of being able to provide cleaning services in Canada.[415]

Since Canada's commitment relates only to cleaning services, this problem could be avoided by dealing with cleaning services separately. Provincial governments could decide to deal exclusively with not-for-profit home care providers but contract, on a competitive tender basis, for associated cleaning services. Whether this would be cost effective or otherwise sensible would have to be determined.[416]

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[413] GATS Art. XIII.1. Government procurement rules are discussed above notes 60-63 and 394-397 and accompanying text.

[414] Jackson & Sanger, above note 8, at 101. Since building cleaning services are grouped under "Business services" in Canada's schedule it might be that the service sector in which Canada has undertaken a commitment does not include services to individuals in the context of home care delivery. It is possible that such services would be included in the residual category of "other services not included elsewhere" in which Canada has no specific commitments. The Provisional CPC code categories referenced in the WTO Secretariat's Services Sectoral Classification List for this category include personal services, specifically identifying "washing [and] cleaning" services (Provisional CPC, *ibid.*, group 970).

[415] This argument is made in Jackson & Sanger, *ibid.*, at 101-102.

[416] In Jackson & Sanger, above note 8, the authors conclude that returning to direct state provision of home cleaning services as part of the provision of home care is unlikely to be contrary to the GATS (at 106).

Health Insurance

Introduction

Canada has made specific commitments in several other sectors that require closer examination, including, most importantly, health insurance services. The possibility of extending provincial and territorial public health schemes to cover new aspects of health care, like home care and pharmaceuticals, has been much discussed. Such initiatives may raise issues under the GATS because of their possible impact on foreign insurers who sell insurance covering these aspects of health care and who benefit from Canada's specific commitments in health insurance.

Extending public health coverage could occur in a variety of situations. As suggested, a government might decide to extend coverage to include a new aspect of health care, such as home care.[417] Insurance against the costs of home care is a service currently provided by private insurers and these services would be affected by such an extension of public coverage. Another situation in which the extension of public funding will occur is in relation to new treatments. When new treatments are developed, usually they are only available to patients who can afford to pay for them directly or with the benefit of private insurance. If, over time, a treatment becomes accepted as medically necessary, provincial and territorial health plans may decide to add it to the list of publicly insured services, reducing or perhaps eliminating the opportunity for private insurers to insure the treatment. Extensions of public funding would also arise if a provincial government decided to stop funding or "delist" certain health services covered under the provincial plan, permitting private health insurance firms to supply insurance for them and, subsequently, the same government decided to again extend public coverage to those services.[418]

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[417] Such a reform was recently recommended in the Romanow Report, above note 5, Recommendations 5, 6 and 7. Similar proposals have been made previously (*e.g.*, National Forum on Health, *Canada Health Action: Building on the Legacy*, vol. 1 (Ottawa: National Forum on Health, 1997), at 21). In 1997, the Liberal government promised to put in place a national home care and pharmacare program (Liberal Party of Canada, *Securing Our Future Together: Preparing Canada for the Twenty-First Century, The Liberal Plan–1997* (Ottawa: Liberal Party of Canada, 1997), at 74-75).

Canada's GATS commitments in insurance services may constrain the flexibility of Canadian governments considering these kinds of policy initiatives. A new measure excluding private insurers from a segment of the market for health insurance may raise concerns under Canada's market access obligation. If the effect of the extension of public funding is to exclude all private insurers from a segment of the market, Canada might not be in compliance with its obligation not to impose a limit on the number of service suppliers in the market. In practice, any expansion of the categories of health care receiving public funding is likely to substantially curtail the market for private insurers. Even if a province permits private insurers to compete, practically it may not be feasible for them to do so. This is the case with other health services currently covered by provincial health plans in provinces where private insurance is not prohibited by law. The existence of public funding, combined with other restrictions on the operation of the market, has precluded the operation of private insurers. If private insurers were excluded from the market, the prospect of a trade challenge may be considered a real one because there are already a significant number of foreign insurers operating in the Canadian market.[419]

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[418] Some provinces, in the interests of reducing costs have de-listed some services. Epps & Flood, above note 97, give the example of British Columbia's decision to stop funding certain breast cancer testing. These and other commentators also refer to "passive privatization" meaning that the manner in which certain medical problems are treated increasingly falls outside those treatments that are publicly funded. This occurs, for example, when publicly funded hospital care is replaced by privately funded drug treatment.

[419] See above notes 113 and 114 and accompanying text for a discussion of participation by foreign insurers in the Canadian market. If, contrary to the conclusion of this study, Canada's public health funding system was subject to the GATS, the analysis would be somewhat different, but the result would be the same as that set out in the remainder of this section. The public system may be considered a monopoly and the extension of funding to new aspects of health care would be considered an extension of the monopoly rights to the supply of a service covered by Canada's specific com-

Even if such a measure were inconsistent with Canada's market access commitments, Canada remains free to change its policies to extend public coverage to privately insured services. In such a case, however, an obligation to provide a compensating adjustment of trade concessions may be imposed.[420] As discussed in Section 2, GATS Article XXI gives Canada the right to modify or withdraw a commitment in a sector. The GATS requires that Canada give three months notice to the Council on Trade in Services of its intention to do so. At the request of any Member affected by this withdrawal, Canada would have to enter into negotiations to agree on a compensating adjustment of its trade concessions. Canada would be required to extend any such adjustment on an MFN basis to all Members of the WTO. If no agreement were reached on an adjustment, any affected Member could refer the matter to binding arbitration. Canada would be precluded from implementing the extension of the public health insurance scheme until compensatory adjustments were made by Canada in accordance with the arbitration award.[421]

The following sections of this study develop an analysis of the likelihood that a future extension of public health funding to aspects of health care that currently may be the subject of insurance supplied by private firms would be found to be inconsistent with the GATS. While some arguments may be made in favour of an interpretation of Canada's GATS obligations that would permit such an extension, the better view is that such an extension risks triggering an obligation to make a compensating adjustment of trade concessions.

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mitments requiring notification and possibly compensation in accordance with GATS Arts. VIII.4 and XXI (Johnson, above note 260, at 19; and Sanger, above note 5, at 83-5).

[420] The compensation obligation under GATS Art. XXI is discussed above note 49 and accompanying text. Johnson, *ibid.*, and Sanger, *ibid.*, suggest that there would be such a compensation obligation.

[421] In some circumstances, there may be a domestic law obligation to compensate both foreign and domestic insurers who lose the ability to carry on this aspect of their business (see above notes 387-389 and accompanying text).

Application of the Governmental Authority Exclusion

This study has concluded that public funding of health services under provincial health plans is within the governmental authority exclusion and not subject to the GATS. One might argue that once new aspects of health care become covered under a provincial scheme, the funding of these services would become subject to the governmental authority exclusion and that, as a consequence, the measures expanding the provincial scheme would not be subject to the agreement at all.[422] The Appellate Body has recognized that some obligations are inherently evolutionary and must be interpreted in light of the circumstances in existence at the time an issue arises.[423] Because "services supplied in the exercise of governmental authority" is an inherently open-ended category that will be applicable to a greater or lesser extent depending upon the particular regimes in place in different WTO Members at different times, arguably it should be interpreted in such an evolutionary way. On this basis, it could be argued that the extension of provincial health insurance should not trigger a compensation obligation. Any services within the governmental authority exclusion from time to time should be excluded from the application of the GATS.

From another point of view, however, because Canada has bound itself by listing health insurance, extending public coverage would be, in effect, withdrawing a concession previously made. Nothing in Canada's specific commitments with respect to health insurance expressly defines Canada's obligations under the GATS as excluding whatever health services are funded under provincial and territorial plans from time to time. Limiting the scope of the governmental authority exclusion to services meeting the requirements for application of the exclusion at the date the GATS came into force would be consistent with the general approach to the interpretation of trade agreements that requires the interpreter to divine what the parties intended at the time the treaty was concluded. Perhaps the greatest difficulty with interpreting the exclusion as allowing Canada to extend the coverage of public health funding regardless of the impact on private insurers, however, is that it would seriously undermine the value of the GATS commitments entered into by Canada and all other WTO Members if a Member could freely exclude the private providers of any listed service simply by offering the service through the state. A WTO panel may be reluctant to adopt such an interpretation for this reason.

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[422] Sanger suggests this interpretation as a possibility only, *ibid.*, at 84-85.

[423] An evolutionary approach was applied, for example to the meaning of "natural resources" in GATT Art. XX in *US – Shrimp*, above note 59. This approach to interpretation is discussed in Lennard, above note 235, at 75-76.

Application of Canada's Horizontal Limitation Permitting the Delivery or Subsidization of Services in the Public Sector

In the alternative, Canada could argue that the horizontal limitation on national treatment in Canada's national schedule of commitments under which Canada retained its freedom to engage in "the supply of a service or its subsidization within the public sector" may apply to protect from a GATS challenge the adoption of new programs under which the state becomes the sole funder of a health service to the exclusion of foreign private sector insurers.

It is not obvious that this vaguely worded horizontal limitation would be interpreted in this way, however. The words of the limitation are capable of other interpretations. For example, the limitation may be interpreted as simply confirming Canada's right to deliver or subsidize services supplied to public sector entities (*i.e.*, entities "within the public sector"). As well, this limitation might be thought to protect the ability of Canadian governments to refuse to make government-supplied or -subsidized services available to private sector service suppliers.[424] Under neither of these interpretations of the limitation would an extension of state funding to new aspects of health care provided to individuals be covered. Consequently, one cannot conclude with confidence that an interpretation allowing Canada to supply the service to the exclusion of private insurers would be adopted on the basis of the limitation. Moreover, if the limitation were interpreted to give Canada this freedom, it would fundamentally undermine the value of Canada's commitments in listed sectors.

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[424] It is not clear, however, why the limitation would be needed in these circumstances since, in the situation described, the government's provision of the service would be protected either under the exclusion for services delivered in the exercise of governmental authority or the carve-out for government procurement, or both. Some other WTO Members have included horizontal limitations that appear to relate to services that would fall within the governmental authority exclusion. For example, the European Communities schedule includes a horizontal limitation preserving its ability to deliver services including, health services, through public utilities (European Communities – Schedule of Specific Commitments (15 April 1994) GATS/SC 31 and Supplements 1, 2, 3, and 4).

More importantly, even if the limitation were interpreted as protecting Canada's flexibility to fund aspects of health care that are insured by private insurers, it would only protect Canada against claims by other Members that such a program is inconsistent with Canada's national treatment obligation. Canada has not extended this limitation to its market access commitments. Excluding all foreign and domestic insurers would be a restriction on the number of services suppliers contrary to the GATS market access obligation for that sector. Consequently, regardless of whatever protection is provided by the limitation, Canada would not be free to put such a program in place because Members would be able to challenge it as a denial of market access.

Summary

Canada's GATS obligations are likely to be implicated by initiatives to expand the coverage of publicly funded health care to the exclusion of private insurers. While an argument may be made that such a measure should bring state funding of the new health service within the governmental authority exclusion, a WTO dispute settlement panel may be reluctant to adopt such an interpretation because it would undermine the value of all of the sector-specific commitments of all WTO Members. Thus the better view — one more consistent with the overall architecture of the GATS — is that a compensatory adjustment may be required in these circumstances. If Canada or a province or territory were to enact such a measure, Canada would be obliged to notify the measure to the WTO and face the prospect of a claim for compensating trade concessions from other WTO Members whose insurers were affected or, if it failed to comply with this process, a claim that it had breached its GATS obligation to provide market access.

Whether these GATS obligations would be a significant deterrent to governments contemplating such a measure would depend on the circumstances. A possible requirement to adjust trade concessions may be less of a concern than the complaints and possible domestic law expropriation claims of Canadian and foreign insurers whose businesses would be affected.[425] Moreover, it might be possible that universal health coverage could be extended in a way that did not cause private insurers to suffer sufficient financial setbacks to give rise to expropriation claims or claims by foreign governments pursuant to the GATS.

Computing and Certain Research Services

Introduction

Computer services and certain research services in the social sciences and humanities have been listed by Canada in its national schedule of commitments. Any government measure affecting computer services or these research services would have to comply with the national treatment, market access and other obligations applying to listed services. These obligations may impose some limits on measures relating to publicly funded universities and colleges that supply these services in the commercial market place.

Computer Services

Canada's commitments in computer services include consulting relating to software and hardware, data processing, database services and hardware maintenance services.[426] Canada's specific commitment means that measures of Canadian governments related to these services could not include any of the market access restrictions prohibited by the GATS and would have to treat Canadian suppliers of such services no more favourably than any supplier of like services from a WTO Member.

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[425] The possible application of NAFTA's prohibition on expropriation without compensation would also have to be taken into account (NAFTA, above note 375, Art. 1110).

[426] Canada Services Schedule, above note 71. The full text of Canada's commitments in computer services is set out in Appendix III to this study.

As noted above, there is evidence that some publicly funded universities sell computer services on a for-profit basis to a limited extent.[427] It was argued that such services would be outside the governmental authority exclusion and subject to the GATS even if the core services of universities were carved out of the agreement under the governmental authority exclusion. Measures related to universities supplying such services would have to conform to Canada's obligations for listed sectors. One category of measures which may be affected in this regard is subsidies. To the extent that public funding of universities can be characterized as a subsidy and the effect of the subsidy is that universities are treated more favourably than foreign suppliers in relation to their supply of the service in the commercial market, such subsidies may have to be made available to suppliers of like services from other WTO Members on a national treatment basis.

Whether any subsidization in fact occurs, is an open question. Publicly funded universities try to operate on a break-even basis but many run deficits. Nevertheless, if public funds were used to purchase equipment or facilities used in the supply of computing services commercially in competition with private suppliers, such supply could be found to benefit from government funding. The corresponding cost reduction for universities as compared to private competitors might be characterized as a subsidy giving universities of competitive advantage.

Again, whether GATS obligations will have any impact in practice would depend on a variety of factors. It is not known, for example, to what degree universities actually participate in the commercial market place. To the extent that they do, universities may be able to avoid any GATS-based challenge to such subsidies by segregating their commercial computer services operations from their publicly funded education services so as to ensure that no cross-subsidization takes place.[428]

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[427] See above note 206 and accompanying text.

[428] Canada might argue that such subsidies were consistent with the GATS on the basis that they subsidize services in the "public sector" as per-

Finally, any such subsidies to universities that gave them a competitive advantage in the commercial market place would be of concern to Canadian private sector suppliers of computer services who compete with universities in this market, not just foreign suppliers. It may be that the objections of domestic private sector suppliers would be a more compelling government concern regarding such possible subsidies than any possible trade challenge under the GATS.

Research Services

The national treatment and market access disciplines also apply to certain research services in the social sciences and the humanities.[429] To the extent that universities engage in commercial research in these areas, the analysis set out above in relation to computer services would apply equally to research services, subject to two important qualifications.

First, Canada's commitments do not extend to the key area of scientific research but are limited to "research and development services on social sciences and the humanities including law, economics except linguistics and language." Second, Canada has included in its schedule a horizontal limitation on its national treatment obligation preserving its freedom to subsidize research and development by domestic suppliers. Any indirect subsidization resulting from public funding of universities, tax subsidies to firms that hire Canadian universities to conduct commercial research and all other subsidies are protected.[430] No foreign supplier of research services could complain that such subsidies were contrary to Canada's national treatment obligation.

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mitted in accordance with its horizontal limitation discussed above notes 424 and accompanying text. Even if universities were characterized as part of the "public sector" for the purposes of the limitation, however, is doubtful that the limitation would extend to protect subsidization of competition by universities in the commercial marketplace.

[429] Evidence was found that universities are selling their research product and engaging in commercial research on contract. See above notes 206-211 and accompanying text.

[430] Concerns about threats to these subsidies from GATS were expressed in *AUCC Update*, above note 206, at 17.

This horizontal limitation only applies to mode 3 (commercial presence), meaning that Canada must provide national treatment to foreign research services suppliers who participate in the Canadian market by supplying services cross-border (mode 1) or to Canadians abroad (mode 2). This is not likely to undermine the protection of the limitation in any significant way. As noted, however, it is very doubtful that Canada would be required to subsidize service suppliers operating outside the country and entering the Canadian market through these other modes.[431] Even if they were whether the fact that the limitation is restricted to mode 3 will substantially diminish its usefulness from the point of view of universities and other Canadian suppliers of social sciences and humanities research services would depend on the extent to which competition with Canadian universities in these services in practice is from foreign research services suppliers outside the country.

Research Expenditures

Canada has also included in its schedule a horizontal limitation preserving its freedom to put in place or maintain tax measures that treat expenditures on scientific research and experimental development (referred to in this section as "scientific R&D") done by Canadian based firms (domestic and foreign) more favourably than expenditures by foreign firms supplying these services outside the country (mode 2) or from outside the country across the border (mode 1). This limitation allows Canada to use the tax regime to confer benefits on firms acquiring such services from Canadian universities and private Canadian-based businesses (both foreign and domestic) compared to foreign suppliers operating abroad. In other words, the limitation allows Canada to condition the receipt of scientific R&D tax incentives on a requirement that the scientific R&D be performed in Canada when a person purchases scientific R&D services from a third party. Even without the horizontal limitation regarding tax measures related to scientific R&D, a WTO Member could not challenge Canada's tax provisions related to scientific R&D complaining that the preference discriminated against it suppliers of scientific R&D contrary to the GATS because Canada has not listed commitments in this sector. As a result, the national treatment obligations of the GATS do not raise concerns.

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[431] See above notes 390-393 and accompanying text. Canada has written "unbound" in relation to service providers temporarily present in Canada (mode 4) with the result that subsidies would not have to be paid to service suppliers temporarily in the country.

The horizontal limitation specific to scientific R&D tax measures does not extend to the Canadian tax treatment of expenditures for research and development services supplied by foreign firms operating in Canada through a commercial presence. Having said that, Canada has also taken a horizontal limitation on its national treatment obligation for subsidies related to research and development. This additional limitation covers, but is not limited to, tax incentives that discriminate against foreign service suppliers carrying on business in Canada. As a result, it appears that Canada has preserved full flexibility with respect to tax measures related to expenditures on scientific R&D.

8. Areas for Future Research

The analysis in this study suggests that there are several areas in which further research could assist Canadian policy makers to better understand how the GATS may affect existing programs and the implications of the GATS for future initiatives in health, education and social services.

First, a better understanding of the degree to which suppliers of health and education services are operating on a commercial basis or compete with each other would allow for much more certain conclusions regarding the application of the governmental authority exclusion. Assessing the degree of government control and the extent of competition in areas like post-secondary education, for example, is a new area of enquiry in which little research has been done. A better understanding of these determinants of GATS application in these key sectors will become more important to the extent that new generally applicable GATS disciplines are adopted in such areas as domestic regulation as a result of a successful conclusion of the GATS negotiations currently going on as part of the Doha Round of multilateral trade negotiations.

A second area in which further research would be helpful is the extent to which foreign private sector businesses are permitted to engage, in law and in fact, in the supply of health, education or social services. Work in this area would provide some guidance regarding the relevance of the MFN obligation. While this study has not undertaken a systematic investigation into foreign participation in health and education services, there can be no doubt that it is increasing as a result of improvements in and greater acceptance of technologically-mediated delivery modes for such services and commercialization initiatives of some Canadian governments. As foreign participation increases, the legal and practical impact of the MFN obligation will become a more relevant concern of Canadian policy makers considering measures that will affect the sphere of foreign private sector operation. If there is foreign participation, existing and prospective future foreign participants in the sector benefit from the MFN obligation. In some areas in which foreign participation is permitted, such as nursing homes, home care, private schools and post-secondary education, a clearer picture of the extent and nature of foreign participation would help to assess the impact of the MFN obligation. In this regard, work on how to design MFN-consistent policy instruments would be of assistance to government policymakers at all levels.

Finally, a better understanding of the degree to which current laws and regulations discriminate between foreign suppliers of health, education and social services in those sectors in which foreign firms are permitted to operate, like nursing homes, would help to improve our understanding of the relevance and impact of the GATS in relation to Canada's existing schemes of regulation in health, education and social services. To the extent that differences exist, the possible application of the MFN obligation would have to be considered.

9. Conclusions

(a) Summary of Findings

This study found that the GATS does not apply to certain fundamental aspects of health, education and social services in Canada. Major federal and provincial social services, our national system of provincial and territorial health plans, "public" hospital services, some provincial and territorial health services programs under which services are supplied directly by the state and public primary and secondary education may all fall outside the scope of the agreement altogether based on the governmental authority exclusion. Applying the criteria developed in the study, these services are not provided on a commercial basis, or in competition with other service suppliers. Unless provided directly by the state, most other health services, including state-funded physician services and commercial training services do not meet these criteria and are likely subject to GATS rules. Whether the GATS applies to measures related to the core services of publicly funded colleges and universities is less clear, but at least the services of colleges are likely to be excluded as well. The availability of the exclusion for the services of universities is more doubtful as a consequence of their relative independence from government.

What is the impact of GATS rules on the way in which the subset of health and education services that are subject to the Agreement are offered and regulated in Canada? For these services, Canada has limited the scope of its obligations by not making specific commitments in respect of health, education and social services, thus avoiding any application of the more significant GATS obligations including national treatment and market access. The absence of specific commitments in the areas of health, education and social services means that the GATS imposes few constraints on the ability of Canadian governments to set, change and implement policy in these areas.[432] This flexibility includes excluding foreign services suppliers in these areas from the Canadian market altogether.

The GATS obligations which do apply do not dictate any specific role for the public or private sectors in the supply of health and education services or prescribe any particular form of regulation[433] and our existing systems of delivery and regulation for those services subject to the agreement are likely safe from challenge. The interpretive rules of the *Vienna Convention* require that Canada's GATS obligations be interpreted in a manner consistent with maintaining Canada's right to regulate to the extent that the language of the provisions permits. In accordance with the preamble of GATS, interpretation should, however, give equal weight to the promotion of trade liberalization.

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[432] This conclusion is shared by some GATS critics (*e.g.*, Grieshaber-Otto & Sanger, above note 7, at 104), though they have differing views on the extent of Canada's freedom in this regard.

[433] Sauvé, above note 179, at 10.

The main substantive obligation applicable to all sectors subject to the GATS is the MFN obligation, but its impact appears to be modest. To the extent that any Canadian government allows foreign services or service suppliers access to the domestic market (including through the Internet), government measures must not treat any service or service suppliers from a WTO Member any less favourably than they treat like services and service suppliers from any other country. In the areas of health and education services subject to the agreement, such as the services of physicians and other health care professionals, nursing homes, private schools and commercial training businesses, foreign participation in the Canadian market is still limited. So long as foreign suppliers are prohibited from entering the Canadian market, the MFN obligation imposes no constraint on government policy.

The degree to which the MFN obligation prevents Canadian governments from discriminating among foreign suppliers who are allowed to enter the market will depend on the circumstances, including, the extent to which services supplied though different modes are found to be like services and what differences in treatment are permitted. Because the criteria for determining if services or service suppliers are "like" and what MFN requires when they are have not been developed in WTO dispute settlement decisions and, in any case, such determinations will be intimately tied to the facts of each case, the impact of the MFN obligation cannot be easily defined in general terms. Where foreign suppliers are permitted to enter the market, the circumstances in which suppliers from different countries may be treated differently from each other, even for legitimate regulatory purposes, remains somewhat unclear. In most cases, this uncertainty would not represent a practical constraint on Canada's ability to ensure that domestic standards are met.

As well, despite some uncertainty regarding the scope of the MFN obligation, there are a number of general observations that may safely be made regarding the impact of the MFN obligation on the policy choices available to Canadian governments. One can say that the MFN obligation does not prevent Canadian governments from treating different foreign service suppliers differently based on their qualifications. GATS specifically provides that Canada remains free to determine what foreign qualifications of service suppliers, such as physicians, it chooses to recognize as fulfilling Canadian quality standards. This critical aspect of Canadian sovereignty is not threatened. If Canada does recognize the qualifications obtained in one country, it must provide an adequate opportunity to other WTO Members to negotiate for recognition of their qualifications, but the GATS does not require the granting of recognition. Canada cannot grant recognition in a way that is discriminatory or that is a disguised restriction on trade.

One can also say that provincial or territorial initiatives to grant access to foreigners impose no obligation on other Canadian provinces or territories to grant access on the same terms or at all. As well, preferences for particular states under NAFTA and other trade agreements that would otherwise be contrary to MFN are expressly permitted under the GATS. Finally, MFN does not mean that Canadian governments are precluded by the GATS from changing their minds regarding whether they wish to have foreign suppliers of health and education services in the market. The MFN obligation may restrict one method of implementing such a change. If a government sought to prohibit only new foreign entrants to the market while permitting existing foreign suppliers to continue to operate, this might constitute an MFN breach in some circumstances. However, there are ways to implement such a grandfathering policy that would not breach MFN and the perceived need to resort to a grandfathering policy will depend on the circumstances. As well, even if a grandfathering policy did breach the MFN obligation there may be no realistic risk of a WTO challenge in some cases.

The special obligations on monopoly and exclusive service suppliers likely do not apply to any suppliers of health or education services that are subject to the Agreement. If it were found that Canadian universities or other suppliers were exclusive service suppliers for the purposes of the GATS, they would be required not to act in a manner inconsistent with Canada's MFN obligation or its commitments in sectors listed in its national schedule of commitments and not to abuse their power in their protected markets when competing in listed sectors. Whether these restrictions would impose meaningful constraints on what universities do in practice could not be determined. In any case, this study concluded that the case for the application of these disciplines to Canadian universities has not been established.

The commitments that Canada has undertaken in relation to some sectors listed in its national schedule may affect Canada's future policy choices in specific circumstances. Canada's listing of health insurance potentially imposes an important limitation on initiatives to expand the coverage of public health insurance. Canada's market access commitments in health insurance may constrain Canada's flexibility to extend public health insurance to new aspects of health care without giving compensating adjustments in the form of trade concessions to WTO Members who claim that their insurance services suppliers already operating in the Canadian market are affected as a consequence. The magnitude of any such compensation would depend on the degree of foreign participation in the market for insuring the new aspects of health care that become subject to public funding. Whether these obligations would operate to discourage governments from adopting such a policy would depend to some extent on whether the policy would give rise to an obligation to compensate Canadian and foreign insurers for expropriating their businesses under Canadian domestic law or other Canadian trade obligations. If such an obligation would be triggered, it may represent a far more powerful disincentive to government action than a possible requirement to make trade adjustments.

Listed obligations in some other sectors, like computer services and certain social science and humanities research services, might have some effect on measures establishing the conditions in which universities and other suppliers of these services operate when they sell their services in the commercial marketplace. In general, government measures relating to these listed computer and research services have to treat foreign suppliers no less favourably than Canadian suppliers of like services, including Canadian universities. It is not known if these obligations have any implications in practice.

In any case, with respect to research services, Canada has preserved significant policy flexibility through horizontal limitations on its obligations written into its national schedule of commitments. Canada has retained its freedom to give subsidies, including tax subsidies, to Canadian suppliers that it does not give to foreign suppliers operating in Canada through a commercial presence. As well, Canada's national schedule expressly preserves its flexibility to accord preferential treatment to tax expenditures for scientific research and development services acquired from Canadian based suppliers which are not available in relation to the same services supplied by foreign suppliers outside of Canada.

(b) Concluding Comments

The findings summarized above are subject to two important caveats. Often in this study, the uncertainty of the application of the GATS to the delivery and regulation of health, education and social services has been referred to. How the governmental authority exclusion and the scope of the MFN obligation will be interpreted remains to be seen. Inevitably, an aura of uncertainty will remain, even as more cases proceed through the WTO dispute settlement process and our understanding of GATS rules is progressively refined. There will always be residual uncertainty when one seeks to understand the application of very generally worded treaty obligations to complex phenomena like the delivery and regulation of health, education and social services. Indeed, efforts to eliminate all such uncertainty would be the end of the multilateral treaty-making process. Nevertheless, it is important to recognize that many of the conclusions of this study are based on interpretations of GATS that have not been adopted in any WTO case. In particular, the exclusion of "public" hospitals, public schools and publicly funded universities and colleges under the governmental authority exclusion depends on the adoption of the suggested "one-way" interpretation of competition. That is, their services will be excluded only if the exclusion's requirement that services be supplied not in competition with other service suppliers is satisfied when "public" hospitals, public schools, universities and colleges do not engage in competition. This is not to say that any dire consequences would necessarily follow from the application of the GATS to these services. The point is that the blanket protection provided by the governmental authority exclusion may not be available if the approach adopted in this study ultimately proves to be different from that adopted by WTO dispute settlement panels.

As mentioned, the existence of this uncertainty regarding the scope of the governmental authority exclusion is due, in part, to the fact that no case has been brought by a WTO Member to test the limits of the exclusion as it applies to any measure relating to health, education or social services. It is also a fact that there has been no groundswell of concern from WTO Members that the governmental authority exclusion is not sufficiently clear or comprehensive, though various academics and NGOs have raised such concerns. The absence of cases and expressions of official concern are some evidence that the existing provision is adequate to protect existing systems in Canada and elsewhere, consistent with the conclusions of this study. At the same time, it may simply reflect a mutual fear that any such action would put domestic systems at risk.

A second important caveat is that, in a general study of this kind, it is not possible to characterize the diverse, complex and dynamic Canadian regimes for health, education and social services exhaustively in terms of the obligations of the GATS. In particular, many aspects of social services were not considered at all. A close look at particular programs may lead to conclusions which are different from the broad generalizations provided in this study. What this study has sought to do is to develop a framework for assessing whether services are subject to the GATS and to provide a preliminary analysis of the domestic landscape in terms of the novel disciplines created in the Agreement.

While this study has concluded that the overall impact of GATS rules on Canada's existing systems for the regulation and delivery of health, education and major social services is likely to be modest, that is not to say that the GATS does not create challenges for Canadian government decision-makers in making future policy choices. In light of the criteria suggested in this study, changes to the way in which particular services are regulated that result in the commercialization of public services or their delivery in competition with private sector service suppliers will remove such services from the protection of the governmental authority exclusion. In this sense, the scope of the GATS application in Canada depends not just on Canada's commitments, but also on what domestic law permits now and in the future.[434] As a consequence, the prospective application of the GATS is something that governments at all levels will have to take into account in connection with their ongoing experimentation with permitting or expanding private sector delivery of health, education and social services, especially where foreign participation is allowed. In effect, the GATS requires that governments ask themselves a series of questions in making decisions regarding measures that relate to health, education or social services including:

- Is the service subject to the GATS – meaning is it a service delivered on a commercial basis or in competition with one or more service suppliers within the meaning of the governmental authority exclusion?
- Does the measure result in the affected service becoming subject to the GATS because the effect of the measure is that one of these criteria for the application of the governmental authority exclusion is no longer met?

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[434] R. Ouellett, "The Effects of International Trade Agreements on Canadian Health: Options for Canada with a view to the Upcoming Trade Negotiations" Discussion Paper No. 32, Commission on the Future of Health Care in Canada, at 7; Grieshaber-Otto & Sanger, above note 7, at 84.

- If the GATS applies to the service, is there or, as a result of the measure, would there be foreign participation in the affected service sector?
- If foreign participation in the affected service sector is permitted,
    - does the measure discriminate, either in law or in fact, in the manner that it treats foreign service suppliers from different countries contrary to the MFN obligation? or
    - should non-discriminatory market access limitations be adopted to control foreign entry both to ensure no more than the desired level of foreign entry today and to help to manage the possible burden of excluding foreign suppliers in the future?

Often the answers to these questions may lead to the conclusion that a measure does not give rise to any implications under the GATS. Nevertheless, these are questions that that governments at all levels did not have to consider prior to the entry into force of the GATS. In order to ensure that Canada conforms to its GATS obligations, they must now be part of the process for developing Canadian public policy in health, education and social services. This may constitute a significant challenge for government agencies and departments at all levels that have limited experience considering the application of international trade obligations.

Appendix I
Selected Provisions of the General Agreement on Trade in Services

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

PART I

SCOPE AND DEFINITION

Article I

Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

   (a) From the territory of one Member into the territory of any other Member;

   (b) in the territory of one Member to the service consumer of any other Member;

   (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

   (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

   (a) "measures by Members" means measures taken by:

      (i) central, regional or local governments and authorities; and

      (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

   In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

   (b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Article XIV

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[435]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

  (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

  (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

  (iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[436] imposition or collection of direct taxes in respect of services or service suppliers of other Members;

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[435] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

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[436] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system that:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

Article XIV bis

Security Exceptions

1. Nothing in this Agreement shall be construed:

   (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

   (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

      (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

      (ii) relating to fissionable and fusionable materials or the materials from which they are derived;

      (iii) taken in time of war or other emergency in international relations; or

      (iv) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

Article XV

Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-

distortive effects.[437] The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

Annex on Financial Services

(Part only)

1. *Scope and Definition*

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

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[437] A future work programme shall determine how, and in what timeframe, negotiations on such multilateral disciplines will be conducted.

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

Appendix II

Selected Services Sectors and Sub-Sectors from WTO Secretariat Services Sectoral Classification List (W/120) Relevant to Health, Education and Social Services

1. Business Services

A. Professional Services

h. Medical and Dental Services (9312)
j. Services provided by Midwives, Nurses, Physiotherapists and Para-Medical Personnel (93191)

5. Education Services

A. Primary Education Services (921)
B. Secondary Education Services (922)
C. Higher Education Services (923)
D. Adult Education (924)
E. Other Education Services (929)

7. Financial Services

A. All Insurance and Insurance-related Services (812)
  a. Life, Accident and Health Insurance Services (8121)

8. Health Related and Social Services (other than those listed under 1.A. h-j)

A. Hospital Services (9311)
B. Other Human Health Services (9319 [other than 93191])
C. Social Services (933)
D. Other

12. Other Services Not Included Elsewhere (95+97+98+99)

Appendix III

SELECTED EXCERPTS FROM CANADA'S NATIONAL SCHEDULE OF SPECIFIC COMMITMENTS

* These sections contain only an abbreviated list of limitations from the original schedule.

** Asterisks designate "part of".

Modes of supply: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial presence; 4) Presence of natural persons

Note: Canada made no additional commitments in the areas below.

I. HORIZONTAL COMMITMENTS

Limitations on market access	**Limitations on national treatment**
Cross-border and consumption abroad *	
1), 2) None	1), 2) None, other than: ▪ Tax measures that result in differences of treatment with respect to expenditures made on scientific research and experimental development services
Commercial Presence * (Except banks which are dealt with in Part B, Section 7)	
	3) None, other than: ▪ The supply of a service, or its subsidization, within the public sector is not in breach of this commitment ▪ Subsidies related to research and development – unbound ▪ Measures related to the supply of services required to be offered to the public generally in the following subsectors may result in differential treatment in terms of: benefits: ▪ income security or insurance; ▪ social security or insurance; ▪ social welfare or price: ▪ public education; ▪ training; ▪ health; ▪ child care

II. SECTOR-SPECIFIC COMMITMENTS

Limitations on market access	Limitations on national treatment
1. BUSINESS SERVICES	
B*. Computer and Related Services a) Consultancy services related to the installation of computer hardware (CPC 841) b*) Software implementation services, including systems and software consulting services, systems analysis, design, programming and maintenance services, excluding those listed under Financial Services 7BI (CPC 842*)	
1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section
C** Research and development a**) Research and experimental development services on social sciences and humanities, including law, economics, except linguistics and language (CPC 852**)	
5) None 6) None 7) None 8) Unbound except as indicated in the horizontal section	5) None 6) None 7) None 8) Unbound except as indicated in the horizontal section
(...)	
7. FINANCIAL SERVICES	
A. Insurance and insurance-related services (CPC 812** + 814) a) Life, accident and health insurance services (CPC 8121)	
1) None, other than: Direct insurance (federal): Services must be supplied through a commercial presence with the exception of marine insurance.	1) None
b) Non-life insurance services (except deposit insurance and similar compensation schemes) (CPC 8129)	
(All provinces): Services must be supplied through a commercial presence.	
c) Reinsurance and retrocession (CPC 81299**)	
Reinsurance and retrocession (federal): Services must be supplied through a commercial presence.	

Limitations on market access	Limitations on national treatment
(All provinces, excluding Alberta and New Brunswick): Services must be supplied through a commercial presence.	
2) None, other than: Reinsurance and retrocession (federal, Alberta and Newfoundland): The purchase of reinsurance services by a Canadian insurer, other than a life insurer or a reinsurer, from a non-resident reinsurer is limited to no more than 25 per cent of the risks undertaken by the insurer purchasing the reinsurance.	2) None, other than: Direct insurance other than life, personal accident, sickness or marine insurance (federal): An excise tax of 10 per cent is applicable on net premiums paid to non-resident insurers or exchanges in regard to a contract against a risk ordinarily within Canada, unless such insurance is deemed not to be available in Canada. Direct insurance (Alberta): A fee payable to the province of 50 per cent of the premium paid and regulatory notification are required on insurance of risks in the province by unlicensed insurers. (Saskatchewan): A fee payable to the province of 10 per cent of the premium is required on insurance of risks in the province by unlicensed insurers.
3) None, other than: Direct insurance and reinsurance and retrocession (federal): The solicitation of insurance services in Canada can only be effected through: i) a corporation incorporated under federal or provincial laws; ii) a corporation incorporated by or under the laws of another jurisdiction outside Canada (i.e., a branch of a foreign corporation); iii) an association formed on the plan known as Lloyds; and iv) reciprocal insurance exchanges.	3) None, other than: Direct insurance and reinsurance and retrocession (Ontario): Capital requirements for mutual insurance companies do not apply to certain mutual insurance companies incorporated in Ontario. (Quebec): Three quarters of directors must be Canadian citizens and a majority must reside in Quebec.

Limitations on market access	Limitations on national treatment
A branch of a foreign insurance company must be established directly under the foreign insurance company incorporated in the jurisdiction where the foreign insurance company, either directly or through a subsidiary, principally carries on business.	
(All provinces): Insurance activities can only be provided through: i) a corporation incorporated under provincial statutes; ii) an extra-provincial insurance corporation, i.e., an insurer incorporated by, or under the laws of another jurisdiction (including a federally-authorized branch of a foreign corporation); iii) an association formed on the plan known as Lloyds; iv) (excluding Quebec and Prince Edward Island): Reciprocal insurance exchanges.	(Quebec): Every insurer not incorporated under an Act of Quebec has, in respect of the activities it carries on in Quebec, the rights and obligations of an insurance company or mutual association incorporated under Acts of Quebec as the case may be. It can also exercise additional activities provided for in the law. However, the activities of such corporation will be limited to those allowed under its constituting legislation.
(Alberta and Prince Edward Island): Subsidiaries of foreign insurance corporations must be federally authorized.	
(Quebec): Non-residents can not acquire, without ministerial approval, either directly or indirectly, more than 30 per cent of the voting rights attached to shares of a Quebec-chartered insurance company or of its controlling entity.	
(Quebec): Upon any allotment or transfer of voting shares of the capital stock insurance company "SSQ, Société d'assurance-vie inc" or of the holding company "Groupe SSQ inc", the minister may ask such companies to prove that the shares were offered by preference to Quebec residents and subsequently to other Canadian residents, but that no offer was made or was acceptable.	

Limitations on market access	**Limitations on national treatment**
(Federal): The purchase of reinsurance services by a Canadian insurer, other than a life insurer or reinsurer, from a resident reinsurer is limited to no more than 75 per cent of the risks undertaken by the insurer purchasing the reinsurance. (British Columbia): Incorporation, share acquisition or application for business authorization, where any person controls or will control 10 per cent or more of the votes of the company, is subject to ministerial approval. Motor vehicle insurance (Quebec, Manitoba, Saskatchewan and British Columbia): Motor vehicle insurance is provided by public monopoly.	
4) See paragraph 4 of headnote on financial Services.	4) See paragraph 4 of headnote on Financial Services.
d) Services auxiliary to insurance (including broking and agency services) (CPC 8140)	
1) None, other than: Intermediation of insurance relating to maritime shipping, commercial aviation, space launching, freight (including satellites) and goods in international transit (all provinces): Services must be supplied through a commercial presence in the province in which the service is provided. (Ontario and Prince Edward Island): Non-resident individual adjusters are prohibited from being adjusters in the province. (Manitoba): Licenses to act as insurance agents and brokers are not issued to non-residents of Canada. (New Brunswick): Licenses shall not be issued to a corporation whose head office is outside Canada.	1) None, other than: (Saskatchewan): Fire or hail insurance contracts have to be signed or countersigned by a licensed agent who resides in the province. Where there is disagreement concerning hail insurance, such damages are to be estimated by an appraiser who is a taxpayer of the province.

Limitations on market access	Limitations on national treatment
(Alberta and Manitoba): A license to act as a special broker authorized to place insurance coverage with unlicensed insurers is restricted to residents of the province, as the case may be. (British Columbia): Licenses for general insurance shall be issued only to residents of the province. (Prince Edward Island): Licenses to act as insurance agent or adjusters are not issued to non-resident of the province.	
2) None	2) None, other than Intermediation of insurance relating to commercial aviation, space launching, freight (including satellites) and goods in international transit (federal): An excise tax of 10 per cent is applicable on net premiums paid to non-resident insurers or exchanges in regard to a contract against a risk ordinarily within Canada, unless such insurance is deemed not to be available in Canada. The excise tax is also applicable on net premiums payable with regard to a contract entered into, through a non-resident broker or agent, with any insurer authorized under the laws of Canada or of any province to carry out the business of insurance.
3) None, other than: (New Brunswick): Licenses shall not be issued to a corporation whose head office is outside Canada. (Ontario and Prince Edward Island): Non-resident individual adjusters are prohibited from being adjusters in the province.	3) None, other than: (Saskatchewan): Fire or hail insurance contracts have to be signed or countersigned by a licensed agent who resides in the province. Where there is disagreement concerning hail insurance, such damages are to be estimated by an appraiser who is a taxpayer of the province.

Limitations on market access	Limitations on national treatment
(Ontario): No licence is provided to a corporation to act as an insurance broker, agency or adjuster if the majority of the voting rights are in shares owned by non-residents. A corporate agency or adjuster or insurance broker which is majority non-resident-owned and licensed as a result of grand-fathering cannot expand through purchase of assets or business or merger or amalgamation with any other broker, agent or adjuster. No licence is provided to a corporation or partnership which is an insurance agency or adjuster if the head office is outside Canada or if any partner is resident outside Canada. (Manitoba): Licenses to act as insurance agents and brokers are not issued to non-residents of Canada. (Alberta and Manitoba): A license to act as a special broker authorized to place insurance coverage with unlicensed insurers is restricted to residents of the province, as the case may be. (British Columbia): Licenses for general insurance shall be issued only to residents of the province. (Prince Edward Island): Licenses to act as insurance agent or adjusters are not issued to non-resident of the province.	
4) See paragraph 4 of headnote on Financial Services.	4) See paragraph 4 of headnote on Financial Services

Appendix IV
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